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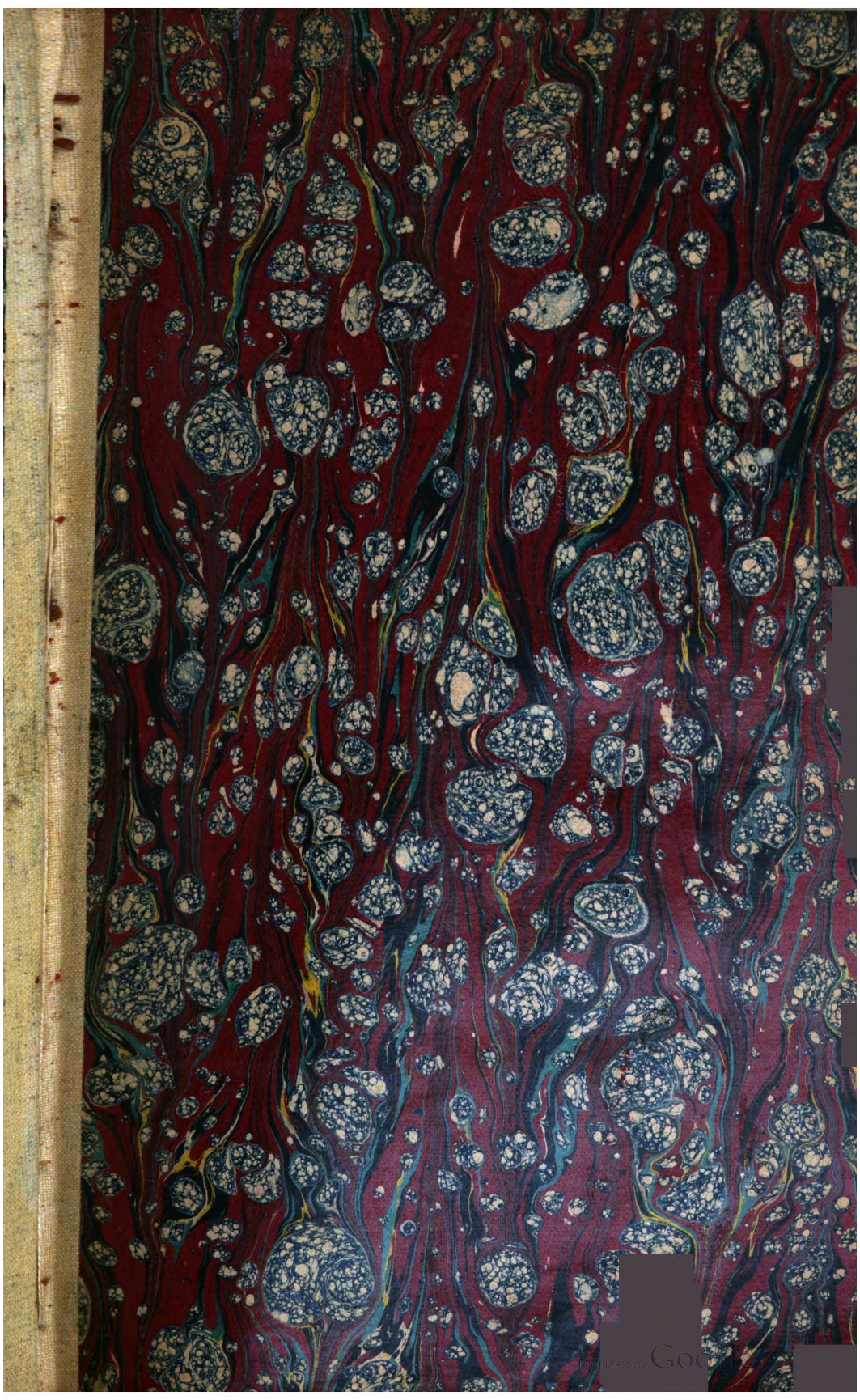
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COLLECTION OF

SELECTED CASES,

ISSUED BY

THE CHIEF COMMISSIONER

AND

FINANCIAL COMMISSIONER

UP TO THE 30TH JUNE 1868.

"The Financial Commissioner circulates a collection of such selected cases "published by the Chief Commissioner and the Financial Commissioner, up to "the 30th June 1868, as have not become obsolete in consequence of legislation "subsequent to their issue."

"2.—No case omitted from this collection should be considered a leading one."

(Finl. Comr.'s Cir. No. 53, dated 2nd July 1868.)

Lucknow:

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SELECTED CASES.

Ikram Singh and others, Appellants, versus Man Singh, Respondent.

On a question of Hindoo law, whether the female line is excluded from the succession to (1) ancestral, and (2) acquired, real property, when there are male collaterals to inherit, *held* that by the law they are not so excluded, although, of course, there is the well known principle that in undivided families the males succeed to the exclusion of the females. The law may be superseded by well recognized custom, but it is not shewn that such a custom exists as regards acquired property.

This case turns entirely on a question of law, whether the female line is excluded from the succession when there are male collaterals to inherit. This question was answered in the affirmative by the district officers in reply to interrogatories put by the Judicial Commissioner, (see page 268, Oudh Judicial Rules,) and these replies made no distinction between ancestral and acquired real property.

2.—As to the law, I find from Morley's digest, page 320, section 118, that it has been laid down by the Sudder Dewani Adalut, that the sons of a daughter of a deceased Hindoo are entitled to inherit his estate in preference to grandsons in the male line of his full brother. Another precedent to the same effect is quoted in section 123, and in a note it is stated, that Macnaghten had not sufficient authority for the statement that the right of daughters' sons is not recognized by Mithila law, and in the order of succession in the western schools including Mithila, given in Baboo Prosonacoomar Tagore's work on Hindoo law, the daughter's son is placed before the brothers and their issue.

3.—It is, of course, a well known principle of Hindoo law, that when the family is undivided, the males succeed to the exclusion of females: but the land in this case did not belong to an undivided family; Lotun lived alone and was sole owner.

4.—The law, therefore, is in entire opposition to the opinion expressed in the judicial circular, but custom often supersedes law in particular families and parts of the country, and in that case it is the rule of the courts as laid down in the Punjab Code to follow well recognized custom. Now it may be safely affirmed that in most, if not all, the great Chuttree families of Oudh, the succession is never allowed to go in the female line. In one or two recent instances the exercise of the power to devise, that was granted to the talookdars in the sanads, in favor of their daughters' issue has caused great dissatisfaction.

5.—But there is a great distinction between ancestral and acquired property in Oudh, and I have no knowledge that the custom above described has equal force with the latter, I cannot accept the judicial circular alone as a rule on this point, for a distinct reply was not given to the question on this head, nor indeed have I any guarantee, that the opinions may not have been given without due research into the customs of the country. I therefore think it far safer to follow the undoubted Hindoo law in

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this case where the property was acquired by purchase, than a doubtful custom; and in this case I think the law will bring one to a decision far more in accordance with the intentions of the deceased, who, I agree with Commissioner in thinking, meant that respondent should be his heir. I therefore uphold the Commissioner's decision.

C. J. WINGFIELD,
Chief Commissioner, Oudh.

(Sett. Cir. 32, dated 17th June 1864.)

Bundee Begum, Appellant, versus Kasim Ali and others, Respondents.

Macnaghten to the contrary notwithstanding, *held* that, in Oudh at least, a childless Sheea widow cannot inherit landed estate.

This case turns entirely on a question of Mahomedan law, whether it is a rule in the Sheea sect that a widow can or cannot inherit a share in her deceased husband's landed estate.

The Lucknow *Moojtahid*, who is an eminent legal authority, affirms positively that by Sheea custom in Oudh she cannot, and the Jais *Molvi* is of the same opinion. The Commissioner quotes Macnaghten and the Punjab Code to prove, that there is no distinction between real and personal property in the Mahomedan law of inheritance, and that a widow is entitled to one-fourth of her husband's estate by both Sheea and Suni law.

I requested the Judicial Commissioner to give me the benefit of his opinion on the law of the case, especially as regarded Sheea custom. He points out that Macnaghten, when he laid down the law to be as above described, was exclusively treating of inheritance according to the Sheea doctrine and had added in a foot-note that, to the best of his belief, he had not omitted any point of material importance. The legal shares he added are the same as those prescribed in the Suni code, both having the precepts of the Koran for their guide. The Judicial Commissioner also informs me that he cannot find any warrant for the *Moojtahid's* opinion in his law books.

I then referred to the Sudder Dewani Adalut, North Western Provinces, to know if the *Moojtahid's* view of the law was held by the court, and if any precedents to this effect could be adduced.

The Registrar of the court forwarded the opinion of the late law officer to the effect that a childless widow of the Sheea sect is not entitled to a share in the landed property of her deceased husband. He also referred to a decision of the Calcutta Sudder Dewani Adalut, giving the opinion of their law officer that the widow and daughter of a deceased Sheea living together succeed to his estate.

The latter case is not in point as the widow in the suit before me is childless.

Referring to the correspondence on native laws in Oudh, pages 26 and 67, I find the principle laid down by the *Moojtahid* affirmed by several officers, and I also see it is

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referred to by the Commissioner of Hazara, in the Punjab Civil Administration Report, as constituting the law of succession to landed estates among the Mahomedan tribes on the Punjab frontier.

On the one side there is the precept of the Koran and the omission of all mention of any divergence from it in Macnaghten, and on the other the testimony of the *Moojtahid*, of the Agra law officer, and of the officers referred to in the correspondence on native laws in Oudh.

The parties appeared before me on the 13th ultimo, but could not throw any further light on the question, One could cite no legal precedents of widows not inheriting, and the other could not say why opinion in the Province was so decided against their claims. I then referred to the high priest of Lucknow for precedents at his court, but he replied that all his records prior to annexation have been destroyed, and since then he has exercised no jurisdiction in such cases, but he affirms that he decided many cases on the principle that a childless widow cannot inherit land.

I do not see how I can avoid coming to the conclusion, that the law among the Sheeas is different from that of the Sunis, in this Province at least, and that by the former, the widow cannot inherit landed estate, and as it is a principle of our judicial system to follow well established custom in any sect, I must, therefore, reverse the Commissioner's decision.

The claim to dower is, I consider, one for the Civil courts, If decreed, it would be for the courts to decide if execution should be taken out against the landed property.

C. J. WINGFIELD,
Chief Commissioner, Oudh.

The 3rd June 1864.

(Sett. Cir. 33, *dated 17th June* 1864.*)*

Mussumat Fatima Khanum, widow of Aga Ahmed, Appellant, versus Absur Bahoo Begum and others, Respondents.

The use of fictitious *(ismfurzi)* names in grants is not illegal, and the right of property rests in the person to whom the grant is actually made, and not necessarily in the person whose name is made use of.

I can hardly conceive the circumstances under which I would accept the testimony of witnesses in this country as proof of the execution of a deed of mortgage in the absence of the document itself, but in this case the production of the deed would not prove that the Queen mother was not the real party to the transaction.

The evidence of Kishn Sahai and his agent is no doubt contradictory, but their contradictions do not tell in support of appellant's claim. The possession of Aga Ahmed and Bunnoo Sahiba must be considered the same, as the former was her son-in-law. Both were in the Queen mother's service, so was Kishn Sahai.—These facts, with the circumstance that on Aga Ahmed's death, the village was held under direct management by the Chukladar till Kishn Sahai (the Queen mother's servant) was put in to manage it, strongly favor the conclusion to which the Settlement Com-

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missioner has come that the real mortgagee and possessor was the Queen mother.

Much stress cannot be laid on the desire expressed by the zemindars (mortgagors) to transfer the village to appellant. They have parted with their rights, and would not unnaturally wish them to be enjoyed by the party that would do most for them. On this principle they have now given evidence in favor of the Queen mother's heirs.

Sharing, then, the opinion of the Settlement Commissioner, that the real mortgagee was the Queen mother, and the parties through whom appellant claims were only her servants whose names were used by her or were entrusted by her with the management of the village, I reject the appeal.

C. J. WINGFIELD,
Chief Commissioner, Oudh.

Application for review of Judgment.

The only ground on which the application for review can be sustained is the first, viz. that to decide in favor of an *ismfurzi* name is against law. But even this is untenable, for it has been ruled in a decision of the Sudder Dewani Adalut Bengal, (*page* 253 *A. of Morley's Digest, Vol. I.*) that fictitious names in grants are not illegal, and the right of property rests in the person to whom the grant is actually made, and not necessarily in the person whose name is made use of.

In this view the production of the deed of mortgage in the name of appellant's husband would not, as I have already observed, affect the decision in the case. That was based on the fact which appeared to me to be established by the evidence, that the village was really mortgaged to the Queen mother.

Application for review rejected.

C. J. WINGFIELD,
Chief Commissioner, Oudh.

(Sett. Cir. 35, dated 8th July 1864.)

Mahdoo Singh, Appellant, versus Bhugwan Singh, Respondent.

See my proceedings of 26th May and Commissioner's of 14th June.

Held that there can be no appeal from the judgment of a court passed according to the award of arbitrators, except on the ground of disregard by the court of the provisions of the Act relating to arbitration. The plea of corruption having been rejected by the court of first instance, cannot

2.—I think the lower court has misunderstood the application of section 354 of Act VIII of 1859. The power granted by that section, can only be employed when an appeal lies on the facts or law. In this case no appeal lay for the reasons hereafter given.

3.—Nor do I think section 37 of Act XXIII of 1861, supports the Commissioner's view, because the reservation conveyed in that section, "unless when otherwise provided" seems to me to exist on the broad principle enunciated in section 325 of Act VIII of 1859, that the judgment shall be final.

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4.—In fact, there can, in my opinion, be no appeal from the judgment of a court of first instance passed according to the award of arbitrators, except on the ground of disregard of the provisions of the Act relating to arbitration on the part of the court; because, if no application has been made to set aside the award, or if the application has been rejected, the judgment, if given in accordance with the award, even though the latter may have left some points undetermined, is declared to be final. This view is corroborated by a ruling* of the Sudder Court published at page 765 of report of selected cases for 1861, in which the Court reversed the order of an appellate court setting aside the award of arbitrators on the ground of corruption, that plea having been rejected already by the lower court. The question of misconduct or corruption having been disposed of, it was held that no appeal lay. Indeed sections 323, 324 and 325 are addressed to the courts that make the reference to arbitration.

be taken up by the appellate court Sections 323, 324 and 325 of Act VIII of 1859 are addressed to the courts that make the reference to arbitration.

* Dated 30th September 1861.

5.—The case refered to by the Commissioner at page 42 of selected decisions* bears out my argument. The illegal procedure, which formed the ground for reversing the judgment based on the award of arbitrators, was on the part of the judge, not of the arbitrators. He had not allowed the parties the ten days time of appeal prescribed by section 324.

* Sudder Court's decisions for July 1863.

6.—I think it an important principle to maintain the finality of the awards of arbitrators confirmed by the judge as I believe to be the intent of the law; or reference to arbitration, instead of expediting and simplifying the procedure of the courts, may be made the means of opening a wider door to appeal and litigation. I therefore reverse the Commissioner's order and direct that the judgment of the Settlement Officer confirming the award of the *punchayut* be maintained.

18*th June* 1864.

C. J. WINGFIELD.
Chief Commissioner, Oudh.

(Sett. Cir. 36, *dated* 21*st July* 1864.)

Ahmed Hoosein, Plaintiff-Appellant, versus Surufraz Ahmed, Deft.-Respondent.

SETTLEMENT COMMISSIONER'S JUDGMENT.

Appeal against the order of Assistant Settlement Officer of Durriabad, dated 3rd September, 1863, decreeing the proprietary right in mouza Dadra, Pergunna Nawabgunj in favour of respondent.

Where it was shown that, according to the custom which had regulated the succession to an estate, the estate was not subject to sub-division on inheritance nor were the profits divided according to inherited

There appears formerly to have been a talooka bearing the name of Dadra, and comprising four or five mouzas. One Kazi Hameed was talookdar many years ago, and the illaka has descended undivided from generation to generation. The parties to the present suit are respectively grandson and son of Mahomed Ayaz, the last talookdar. On the death of Mahomed Ayaz, his eldest son Surufraz

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shares, but one of the family acted as manager and received the proceeds, the others receiving only maintenance, *held* that the custom must be maintained and that the estate cannot be divided.

Ahmed, respondent, succeeded to the estate, and held up to 1252 F. except on some few occasions when the estate was held *kham*. In that year respondent appears to have failed altogether in managing the estate, which passed into the hands of his younger brother Khoda Buksh, father of appellant, and Khoda Buksh held up to annexation. In 1264 F. Khoda Buksh was admitted to engage, but, having joined the rebels, an order of confiscation was issued against him, and in 1858-59, his elder brother, respondent, was re-admitted, but no sanad has been given him, hence he is not considered a talookdar. Appellant now claims the village, and the Assistant Settlement Officer has, on grounds which I cannot understand, and which appear to me totally inapplicable to the case, rejected the claim. The simple question which Assistant Settlement Officer had to decide, was, whether the possession of Khoda Buksh was antagonistic to that of respondent. If this issue was decided in Khoda Buksh's favour, then respondent's claim was barred by limitation, as his last possession was in 1252 F. and there is no mention of his having preferred any claim in 1264 F., and consequently the period of limitation would reckon from the date of the last summary settlement in 1858-59. It appears to me that Khoda Buksh's possession was antagonistic to that of respondent. When respondent was in possession, Khoda Buksh got only maintenance, and when Khoda Buksh took possession, respondent got no share of profits or zemindari rights, but mere maintenance. Under this veiw of the case, respondent's claim is barred by limitation, and a decree must issue in favour of appellant, unless the order of confiscation passed against appellant's father, preclude him from recovering this, or any other property. The Settlement Officer has ruled that the confiscation of Khoda Buksh village did not reach other villages claimed by his brother or son.

CHARLES CURRIE,

4th November, 1863. *Settlement Commissioner.*

FINANCIAL COMMISSIONER'S JUDGMENT.

Appeal against the order of Settlement Commissioner.

There is no dispute concerning the facts of this case; the estate has up to the present not been subject to sub-division on inheritance, nor have the profits been divided according to the inherited shares, but one of the family has acted as manager, and received the proceeds, the others receiving only maintenance. On the death of Mahomed Ayaz, his father, the appellant Surufraz Ahmed, the eldest son, succeeded to the management. In 1252 F., he allowed the revenue to fall into arrears and his younger brother Khoda Buksh, the father of Ahmed Hoosein, the special respond-

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ent, paid up the arrears and got the kaboolyut in his name. During the mutinies, Khoda Buksh went into rebellion. Surufraz Ahmed, in 1266 F., engaged for the payment of the revenue with the British Government. He also paid a fine on account of his brother in rebellion and reassumed the management of the estate. The Assistant Settlement Officer decreed the proprietary rights in favour of Surufraz Ahmed. The Settlement Commissioner, reversed this order and decided under the old rule of limitation that the claim of Surufraz Ahmed was barred, but under the new rule this position is no longer tenable. It appears to the Financial Commissioner that the custom which has hitherto regulated the descent of this estate must be upheld, and that it cannot be divided. The question remains as to who is to be manager. As Surufraz Ahmed was the eldest son, and original manager, and as by force of circumstances he became so again, the Financial Commissioner sees no cause to disturb his possession in favour of the son of his younger brother, and accordingly reverses the order of the Settlement Commissioner, and decrees the proprietary rights in mouzas Dadra and Raipoor to the appellant Surufraz Ahmed, the maintenance to be granted to respondent, Ahmed Hoosein, to be equal to that formerly assigned to Surufraz Ahmed.

R. H. DAVIES,

Financial Commissioner,

18th January 1865. *Oudh.*

(Finl. Commr's. Cir. No. $\frac{2}{112}$ *A. dated* $\frac{27}{30}$ *January* 1865.*)*

Innayut Kureem and others, Appellants, versus Karamut Hoosein, Respondent.

Appeal against the order of Settlement Officer Fyzabad, dated 4th December 1864, *preferred to the Commissioner Fyzabad, and referred by him to the Financial Commissioner's Court.*

The Summary Settlement of 1858-59 having been made with an individual, and he having been declared to be a talookdar by the Chief Commissioner *held* that his title to the proprietary right rests on the grant of the British Government and cannot be disturbed.

This case comes before the Financial Commissioner with a memorandum from the Commissioner of Fyzabad, stating that the object of the appellants is to show cause against the Chief Commissioner's decision of the 3rd February 1864, of which the following is a transcript "Whenever there are two interests in an estate an inferior and superior, the possessor of the latter is a talookdar. But this distinguishing feature of a talooka may be found in a single village, and it was never intended by the Government order of 1859, declaring the summary settlemants made with talookdars final, to bar all claims to shares in petty estates of this kind. The scope of that order was to protect the talookdars from being supplanted at regular settlement by the under-proprietors, and by that designation, the

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principal landed families of Oudh were referred to in regard to whose claims to the appellation in every sense no doubt could be entertained."

"To hold that because there are inferior proprietors in a petty estate of two or three villages, the party with whom the estate was settled is thereby a talookdar, and secured by that title from all adverse claims to engage preferred by members of his own family, or others sharing an equal interest, would, the Chief Commissioner thinks, be going far beyond the scope of the Government order."

"Therefore, to determine whether an estate is a talooka. and the owner a talookdar protected from such claims, and entitled to a sanad, other features of the tenure must be looked to. It is perhaps one of the main characteristics of a talooka, that it decends undivided. The Kuttooria estate has never been subdivided, but then there have been only single heirs, The light in which the family was regarded by the native Government is of importance to the question, and it seems clear that Nubbee Buksh was always regarded and treated as a talookdar. The estate is a small one, but if it is sufficiently extensive to have gained for the owner the estimation and treatment of a talookdar, both with his neighbours and the Government officials, it is enough to place the estate in the category of those to which the finality of the settlement applies.

"The Azimgurh property was inherited through another family, and is no part of the estate acquired by Kullunder Buksh, consequently its separation is not a breaking up of the talooka, and the fact that the deceased talookdar, though he evidently preferred his own children to Kurramut Hoosein, and made over to them the Azimghur property, did not venture to dispose of the Fyzabad one in the same way, can, the Chief Commissioner thinks, only be accounted for by his conviction, that the latter was a talooka.

"The Chief Commissioner is therefore of opinion that the possessor of the Kuttooria estate is a talookdar in the Oudh acceptation of the term and in the sense in which it is used in the Government letter of October 1859, and that he is entitled to a sanad in consequence,"

It is clear that the above order cannot be contested before the Revenue courts. The summary settlement of A. D. 1858 of the villages in dispute having been made with Kurramut Hoosein, and he having been declared to be a talookdar by the Chief Commissioner, it follows that his title to the proprietary rights rests on the grant of the British Government, and cannot be disturbed. The appeal is therefore dismissed.

R. H. DAVIES,

Financial Commissioner, Oudh.

(Finl. Comr's. Cir. No. 3 dated 23rd-27th. January 1865.)

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Tuffuzool Ali Khan and others, Appellants, versus Bhugwunt Singh, Respondent.

The village disputed, at the time when the summary settlement of A. D. 1858 was made, was in *jaghir*, but was resumed in 1859. It was then settled with the respondent, a talookdar, but not entered in the kuboolyut attached to his sanad. The Settlement Officer held that on this account, and because the village was not in the talookdar's talooka in 1263 F. or at the time of annexation, his title was not protected from dispute. The Settlement Commissioner in appeal over-ruled this opinion. The Financial Commissioner observes that the declaratory order of the Governor General, put forth in the letter (No. 6268 of the 10th October 1859) from the Secretary in the Foreign Department, and confirmed by the Secretary of State, has (under section 25 of the Indian Council's Act,) the force of law. The words of that order are "that every talookdar with whom a summary settlement has been made, since the reoccupation of the Province, has thereby acquired a permanent, hereditary and transferable proprietary right in the talooka for which he has engaged." It follows that any settlement made with a talookdar up to the date of the order, conveyed with it the proprietary right, and in the present case, the Commissioner should apply for the entry of this village in the kuboolyut attached to the talookdar's sanad, in ratification of the rights conferred upon the respondent. The Financial Commissioner considers himself legally debarred from interfering with the Commissioner's order, and dismisses the appeal.

Held that the declaratory order of the Governor-General, put forth in letter No. 6268 of the 10th October 1859 from the Secretary to Government in the Foreign Department has the force of law, and, that in accordance with its provisions, any settlement made with a talookdar up to the date of the order, conveyed with it the proprietary right.

R. H. DAVIES,

27-30 January 1865. *Financial Commissioner, Oudh.*

(Finl. Commr's. Cir. No. $\frac{4}{223}$ *dated* $\frac{27}{30}$ *January* 1865.*)*

Sheodeen and others, Plaintiffs-Appellants, versus Amrez Singh, Defendants-Respondents.

SETTLEMENT COMMISSIONER'S JUDGMENT.

Appeal against the order of the Settlement Officer of Fyzabad, dated 30th June 1864, rejecting appellant's claim to the sub-settlement of mouza Koolhyapore.

The appellants claim the sub-settlement of Koolhyapore by virtue of long possession. They admit that the village belonged to the Syuds before it passed into respondent's estate, and they urge that the Syuds first gave them 90 beegas rent-free, and subsequently allowed them to hold the whole village on a rental of Rs. 60. When the respondent acquired the village, he allowed appellants to retain possession, but raised the rent. Appellants before the Settlement Officer averred that the Syuds made over the village to them without payment. Before this court, they shift their ground, and plead a title by "*birt.*" This plea will not help them, for they have filled puttas or lease bonds granted by respondents for the year 1239 to 41 F. 42 to 44 F.

The possession of a lease does not necessarily denote under-proprietary rights.

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and 44 to 46 F. and their acceptance of these bonds stops them, from basing their tenure on the *birtnámá*. The latter deeds supersede the earlier, and the production of these puttas clearly show that the appellants were nothing more than lessees holding under terminable leases. It is true that had appellants any original proprietary right to boast, the court would have accepted these puttas as proof of possesion, but, in the absence of all proprietary title, these lease-bonds for regularly increasing sums, and expressly excluding rent-free tenures and other proprietary dues can only be held to prove that appellants occupied the position of simple lessees.

DECREE.

The court therefore refuses to interfere, and dismisses this appeal.

CHARLES CURRIE,

16th Septr. 1864. *Settlement Commissioner.*

FINANCIAL COMMISSIONER'S JUDGMENT.

In appeal nothing is asserted, but the continued possession of a lease by the appellants. Assuming the ambiguous designation of "*pookhtadars,*" appellants claim to be recorded as under-proprietors entitled to a sub-settlement. But the possession of a lease does not necessarily denote under-proprietary right, and it is in evidence that the proprietary right in full passed from the Syuds to the respondent by whose sufferance appellants have occupied under a lease. The Financial Commissioner concurring in the judgments of the lower courts, dismisses the appeal.

R. H. DAVIES,

Financial Commissioner, Oudh.

(Finl. Commr's. Cir. No. $\frac{5}{418}$ *dated* $\frac{18}{20}$*th February* 1865.*)*

Bhyron Buksh Singh and others, Appellants, versus Mehpal Singh, Respondent.

Held that an unbroken prescription of 6 or 7 generations is sufficient warrant for maintaining the family usage under which a talooka has descended to a single heir.

The claim of the appellants is to their ancestral shares according to the Hindu law of inheritance in an undivided estate of which the respondent is talookdar and sole malguzar. The lower courts have decided that the claim is inadmissible, because the talooka has remained undivided for six or seven generations, and always descended to a single heir. Appellants allege that the talooka in dispute is the residue of a much larger one, which has been gradually split up by successive partitions under the law of inheritance, and that the custom is that division shall take place when the co-sharers desire to separate their interests and live apart. Also that in the absence of respondent, one of them has held the kaboolyut. The Financial Commissioner is of opinion that the decision of the lower courts must be upheld. There may be cases in which it is difficult to say at what point custom supersedes the law of inheritance, but in the pre-

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sent instance, an unbroken prescription of six or seven generations is sufficient warrant for maintaining the family, usage under which the talooka has descended to a single heir. As regards admission to the kaboolyut during respondent's absence, even if it proved anything, it would be only a contingent right, which the present decision does not affect.—Appeal dismissed.

R. H. DAVIES,

Financial Commissioner, Oudh.

(Fin. Commr's. Cir. No. 873, dated 27th April, 1865.)
3rd May

Sheo Buksh, Appellant, versus Ouseree Singh, Respondent.

Proceedings of Pundit Mahdoopershad, Extra Assistant Commissioner of Sultanpore, dated 20th August 1864.

Illustrates customs having a bearing on the proprietary tenure of land. It might happen that brothers managing and enjoying their shares separately, continued, with their families, to live together, and their doing so would not necessarily prove co-partnership.

It is proved by investigation that Hindoo Singh, the ancestor of both parties had three sons—Dya Singh, Moonna Singh and Deena Singh. Dya Singh the eldest, was father of defendant, and Moonna Singh the younger was father of plaintiff. Hindoo Singh held a share in some villages in pergunnahs Suhja and Inhowna. Forty years ago, all the three sons of Hindoo Singh held separate kuboolyuts by mutual consent, as per detail below :—

Dya Singh held the kuboolyut of shares in villages included in Phukhra, pergunnah Suhja.

Moonna Singh, do. do. of Hunjurwa.

Deena Singh, do. of villages included in Chelowlee.

Accordingly Hunjurwa has ever since remained under the kaboolyut of plaintiff's father, and plaintiff himself in succession. But Chelowlee first came under the kuboolyut of Deena Singh, and on his death of his son Buldee Singh, and in 1247 F. on the latter being killed, it fell into the kaboolyut of defendant. At this settlement, Bussunt Singh and Dulput Singh, sons of Buldee Singh claimed their share, but in consequence of their long dispossession, their claim was rejected on 16th May 1864. Plaintiff now out of the three shares of defendant in Phukhra and Chelowlee claims one share, and says that although Hunjurwa was under the kaboolyut of himself and his father, and Chelowlee under the kaboolyut of Deena Singh and afterwards of his son, yet the illaka was not divided according to their shares—that plaintiff always lived with defendant, and has separated only during the current year, and that consequently he is entitled to a proper share. Defendant says that from the time that Hunjurwa came under the kuboolyut of plaintiff's father, neither plaintiff nor his father ever lived with him (defendant).

The following, therefore, are the points of issue.

1.—When Dya Singh and his brothers held separate kuboolyuts, was the partition of shares made, and were the kuboolyuts held by them according to their respective shares?

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and if not, under what system were the kuboolyuts held by them?

2nd.—When the kaboolyuts were thus separated did each kaboolyut-holder bear the losses and profits of his own holding, or did all the brothers do so in common? *i. e.* was the separation of kaboolyuts real or nominal?

3rd.—If the profits of each holding were enjoyed exclusively by its real holder, and not placed in a common chest to be shared by all, did the families of all the brothers live together and feed together; and if so, at what rate did each brother contribute towards the maintenance of the families?

With regard to the first point, investigation shows that the father of defendant was, according to the genealogical tree and the family usage, entitled to six shares, the father of plaintiff to one share, and Deena Singh to one share. There is no record of the division of the shares to shew whether, when the kaboolyuts were separated, they were made according to the respective shares of the three brothers, or how: but on calculation of the jumma of the summary settlement of each holding, I find that the jumma of the illaka of Chelowlee, the share of Deena Singh, and in possession of defendant, amounted to Rs. 816-3-3, that of Phukhra, the share of defendant, Rs. 641-7-0, and of Hunjurwa, Rs. 713. Thus, the difference in the jumma of each share seems to be small, which makes it probable that at the time when the kaboolyuts were separated, the amount of the *nikasi* of each share had been thoroughly considered.

With regard to the 2nd point, it has been found, that when the kaboolyuts were separated, each kuboolyut-holder became responsible for the losses, and enjoyed the profits, of his respective share. It has not been discovered that after the separation of the kaboolyut, the income of Hunjurwa was ever credited to the joint fund, and used for the joint expenses of the family. With regard to Deena Singh, plaintiff admits that after the separation of the kaboolyut, he began to live separately, and that his heirs are still living separately. Plaintiff merely alleges, that he alone lives with defendant, but confesses that he has no interference in the collection and assessment of rent of Phukhra and Chelowlee, nor did he share with either defendant or his father in the profits or losses of Phukhra and Chelowlee. Similarly, in Hunjurwa the possession of plaintiff's father and afterwards of plaintiff himself alone is discoverable without any interference on the part of defendant. It is also proved from the statements of most of the witnesses that the transactions of the parties were separate from each other. Goordutt and Sheodeen bankers, produced some bonds for debts executed separately by the fathers of the parties. Plaintiff admits the genuineness of the bonds, but says that whoever went to borrow, got the loan in his own name. This is improbable, the custom being that wher. brothers live together, all bonds

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are executed in the name of the head of the family, and not in the name of every member of it.

With regard to the 3rd point, though the possession of the shares and their income were not enjoyed in common, yet the families of both parties are living together. From the enquiries made by my nazir and myself on the spot, it has been ascertained that the families of the parties were living in one house, but with regard to their having a common table and wardrobe, the reports varied; some saying that both the families ate separately, while others, that they not only lived in one house, but had their expenses from a joint purse. The reason of thus living together has been stated by some to be that in consequence of hostility on the part of the co-sharers in the illaka of Phukhra, the two families not only lived together, but at a distance from the village in a fortified place. This statement appears to be correct, and it was on account of this mutual hostility that the father of defendant and Buldee the son of Deena Singh lost their lives. Thus, when all the business connected with each brother was conducted by him separately, the fact of the families living together owing to fear of enemies cannot be held as a ground of copartnership. Plaintiff gives a statement of the marriage expenses of his daughter celebrated in 1257 F. with Raja Sheoram Buksh, talookdar, which shews that plaintiff had contributed Rs. 610, and defendant 4,312-14 for the marriage. Although defendant denies the payment of this sum, and admits that he had made only some presents in articles, yet considering the close relationship between the parties, the contracting of an alliance with so high a family as that of the talookdar and the mutual good feeling existing between them, it appears to be no wonder that defendant should have paid such a sum, but this contribution, being for the above reasons, as well as for the maintenance of the prestige of the family, must be considered as an act of grace, and by no means affecting the shares of the parties in land. Plaintiff produced some letters written by defendant to the effect, that the amount of certain bonds executed by defendant had been paid out of the income of Hunjurwa. But defendant accounts for it, and the putwari confirms the statement, that defendant often stood security for demands against the plaintiff, and that Hunjurwa remained under the sole possession of plaintiff; consequently, these letters are of no good as proof of plaintiff's claim. I therefore dismiss plaintiff's claim.

Financial Commissioner's Order.

In this case the decision of the Extra Assistant Commissioner has been upheld by the Settlement Officer and Commissioner, and the Financial Commissioner sees no cause to admit a special appeal. As the case is illustrative

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of customs having a bearing on the proprietary tenure of land in this Province, its publication has been directed.

R. H. DAVIES,

Financial Commissioner of Oudh.

(Finl. Commr's. Cir. No. 953, dated 11/12th May 1865.)

Dirgpal Singh and others, Appellants, versus Talehmund Kocar, talookdar of Soorujpore Burel, Respondent.

JUDGMENT OF SETTLEMENT OFFICER.

Held that the summary settlement of 1858, and the Governor General's sanad secures to a talookdar the full proprietary right; and the title thus obtained cannot be contested in the Settlement courts. The stipulation protecting the rights of parties holding under the talookdars, does not cover claimants who never held or occupied under the tolookdars.

The word "talooka" as used in the Governor General's declaratory order dated 10th October 1859 includes all villages for which kabooliyuts were given at the summary settlement by a single talookdar.

The plaintiffs claim several mouzas commonly known as talooka Rawut Serai. This estate, it is alleged, was held by their ancestors until 1262 F. when a certain Sheikh Ramzan Ali raised the jumma to a sum which they could not pay; and the defendant, a talookdar of the Durriabad district, was admitted to engage. The defendant, through her agent, pleads that the zemindari belonged to her husband, who was seized by the authorities and imprisoned in 1852 F. dying in confinement; and that during this time the plaintiffs obtained possession, and held the estate until 1264 F. The allegation as to the mode in which the plaintiff lost the estate about 1250 F. recovering a year or two latter, and holding it until some time in 1262 F. the year before annexation, is fully borne out by the evidence adduced on both sides. It is moreover a matter of notoriety that a portion of the Soobeha pergunnah was rack-rented by Ramzan Ali, and that many estates fell out of cultivation about 1262 F. As regards the ancient proprietary title, there may be some doubt: two canoongoes and the evidence generally prove that from time immemorial the estate was held by the Amethia clan to which plaintiffs belong, while Chowdree Surufraz Ahmed, himself a canoongoe, states that the zemindari belonged originally to the Burelia clan, represented by defendant. It is at all events clear from the evidence both oral, documentary and written, that the Burelia people had not for very many years held the estate previous to 1250 F. about which time, the deceased husband of defendant was put in possession. He held but a year or two at most, the nazim, Man Singh, attacking and seizing him in 1252 F. At his death, the Durriabad estates were restored to his widow, but it is worthy of note that the estate now in dispute, situated on the southern bank of the Gomti, was not restored for years after that—namely until 1262 F.

The facts of the case then, as they appear to me, are that for several generations the estate in dispute was held by ancestors of the plaintiffs' father and grandfather &c; the Burelia clan, represented by the husband of deceased, did not assert a claim until 1250 F., held then for a short time, and again recovered possession in 1262 F. how or why is not shown by the defendant. The talookdars' settlement

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has given defendant a permanent title; had it been open to adjudication, the estate must have changed hands. The case, as it stands, is one of those alluded to in paras: 5 and 6 of circular No. 19 of 1861.

Settlement was made with the defendant on the statement only of her agent. It was approved by the Chief Commissioner, as appears by his signature on the English Statement A, on the 28th August 1860, but the settlement had been completed by Captain Chamier Officiating Deputy Commissioner on 9th August 1858. Considering how little right to the estate apart from the present status of it has been shown by defendant, and that plaintiffs, on the other hand, have established a valid title, I am of opinion that a decree must be given in favor of plaintiffs, and that a payment of malikana to the extent of ten per cent., on the government demand will meet the merits of the case. Decree accordingly of the under-proprietary right in favor of plaintiffs, they paying the government demand plus a malikana of ten per cent to the defendant and bearing all village expenses.

J. PERKINS.

15th March 1864. ——— *Settlement Officer.*

Appeal against the order of Settlement Officer of Sultanpore dated 15th March 1864.

SETTLEMENT COMMISSIONER'S JUDGMENT.

This is really a claim to the proprietary right of Datowlee Chunda, but, appellant being a talookdar, the respondents have speciously laid claim to the under-proprietary right. The hereditary right of property in the village is uncertain, two canoongoes and the majority of the witnesses depose to the Amethia clan of Rajpoots, to which respondents belong, being the hereditary owners, while Chowdree Surufraz Ahmed, himself a canoongoe, and several witnesses say that the Burelias or appellant's family are hereditary. For many years previous to 1250 F. the respondents' family seem to have held possession; about that time appellant's husband gained possession for a short time and the appellant did not regain possession till 1262 F. Appellant was found in possession at annexation and was admitted to engage at both summary settlements. Her admission to engage subsequent to the reoccupation has, under the Governor General's declaration, secured to her the full proprietary title. The Settlement Officer admits this, but adds that the case as it stands is one of those alluded to in paras. 5 and 6 of circular No. 19 of 1861, and proceeds to say that considering how little right to the estate, apart from the present status of it, has been shewn by the appellant, and that respondents, on the other hand, have established a valid title, and then decrees in respondents' favor the under-proprietary right in the entire village. The court cannot affirm the Settlement Officer's order: to do so would be to open a door to claims to the proprietary right in a vast

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number of villages, the title to which has been secured to the talookdars by the Governor General. The court does not consider paras. 5 and 6 of circular 19 of 1861, in any way applicable to this case. The paras referred relate to cases in which villages were farmed to talookdars who had never previous to that time had any connexion whatever with them; such is not the case in the present instance. The appellant's hereditary title to the village is, at the most, doubtful, and it is shewn that prior to annexation, her family *had connexion* with the village; so much so that appellant being found in possession at annexation was maintained in her position notwithstanding that the order of the day was to oust talookdars and admit village-proprietors. This is a case in which, but for the Governor General's order, the appellant's title might have been contested by the respondents, but even then it is questionable whether they have substantiated so clear a title as would justify an interference with the summary settlement arrangements. The appellant and respondents were contesting for the village prior to annexation, and the appellant was fortunate enough to get hold of the village first at the time that British rule was introduced, and her title has been secured. Respondents do not attempt to shew that they held any rights under the appellant, and therefore they cannot claim any now.

C. CURRIE,

6th June 1864. *Settlement Commissioner.*

Appeal against order of Settlement Commissioner, dated 6th June 1864.

FINANCIAL COMMISSIONER'S JUDGMENT.

This is a case of some hardship, and the Financial Commissioner has considered it carefully, but he regrets that he finds himself legally debarred from interfering in favour of the special appellants (plaintiffs). There can be no doubt that through the summary settlement of 1858, and the Governor General's sanad, the respondent has acqired the full proprietary rights of the villages in dispute, and the title thus obtained cannot be contested in the settlement courts. In the present case also there can be no doubt that the settlement was in accordance with the intention and policy of the Government at the time, namely, the maintenance of the *status quo* immediately preceding annexation. Moreover, the stipulation protecting the rights of parties holding under the talookdars does not warrant the claim of the special appellants to subordinate rights, for appellants have never held, or occupied under the respondent, nor do so at present. It has been argued in special appeal that under the Governor General's declaratory order, the proprietary rights in their own "talookas" were grant-

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ed to talookdars, and that as these villages did not belong to respondent's "talooka" they are not affected by the summary settlement. But the Financial Commissioner holds that the word "talooka" as used in the order must be construed to include all villages for which kaboolyuts were given at the summary settlement by a single talookdar.—Appeal dismissed.

R. H. DAVIES,

Financial Commissioner, Oudh.

(Finl. Commr.'s Cir. 1199, *dated 8th June* 1865.)

(1.) Baboo Bhyron Buksh, Appellant, versus Gungadeen and others, Respondents. (2.) Dulleep Singh and Runjeet Singh, Appellants, versus Baboo Dan Bahadoor Singh, Respondent.

MINUTE.

These are cases referred for orders by the Commissioner of Baiswarra. The general up-shot being that the Assistant Settlement Officer of Pertabgurh decreed claims for *seer* on the report of the Sudder Moonserim that so much was in the occupation of the claimant, and without further enquiry as to the origin and composition of the component parts of the holding.

For instance, in one case whilst the claim was 673 beegas, 828 beegas were decreed under the heads of cultivation, however permitted, *baghs*, habitation, waste, tanks.

It is requisite to point out that *seer* is not necessarily co-extensive with all the land its claimants may hold in a village in any manner whatever. It is, indeed, frequently an object with the claimant to prove that all his holding is *seer*, but nothing requires to be more carefully sifted, and the objections of the opponent should be heard and well weighed. In old days, it was a common practice when large villages were sold at auction, for the ex-proprietors to make out that so large a proportion was *seer* held at low rates as to induce the auction purchasers to abandon the village as unprofitable.

Speaking generally, the true *seer* of an ex-proprietor is that land which was left to him at the time that he either conveyed his proprietary right to another party, or was ousted from the malguzari. Of this land, which probably was at the time and has ever since remained under the cultivation of himself and his *shikmi assamis*, he is entitled to be recorded as the sub-proprietor. If he has held other land at lower rates than cultivators of his own class in the same neighbourhood or village, for more than 12 years before annexation, he may also make out a claim to this.

But he has no title adverse to the proprietor in fields added to the original *seer* in his capacity of cultivator, for which he has paid the rent demandable from cultivators of a similar class.

As regards his claim to *baghs*, they should be taken up and decided under the rules.

Seer is not necessarily co-extensive with all the land its claimants may hold in a village, Speaking generally, the true *seer* of an ex-proprietor is that land which was left to him at the time that he either conveyed his proprietary right to another party or was ousted from the malguzari. Of this he is sub-proprietor. He may also make out a claim to other lands which he has held at lower rates than cultivators of his own class for more than 12 years before annexation. In ascertaining the extent of *seer*, the rent paid for component fields should be investigated. Claims to *baghs* must be taken up under the rules, and claims to habitations, tanks, waste, and manorial rights, be proved by specific evidence.

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So with regard to habitations, tanks, waste, and manorial rights of all sorts, he must prove his claim to a share or the whole of these by specific evidence. The bare fact of his having some usufructuary privileges, perhaps in common with other cultivators, is insufficient to prove them accessories of his *seer*, though, if he has never parted with his proprietary rights by voluntary conveyance, he may have retained them, except when they are involved in the malguzari.

In ascertaining the extent of the *seer*, the amount of rent paid for the component fields should also be investigated, as this is generally the key to the tenure on which each is held.

It will not probably be necessary to make a separate record when the claims are to various rights; all that is required is, that each shall be distinctly examined by the court and supported by the plaintiff.

R. H. DAVIES,

16th June 1865. *Financial Commissioner, Oudh.*

(*Finl. Comr's. Cir. No.* 1291, *dated* 19*th June* 1865.)

Bissesur Buksh, Appellant, versus Sheodurshun Singh, Respondent.

"*Appeal against the Assistant Settlement Officer's order of the* 24*th September* 1864, *decreeing to plaintiff—respondent, Poorwa Burrearpore, in extent* 140 *beegas and* 3 *biswas, in pergunna Munnowa, rent-free, in virtue of old proprietary right.*

COMMISSIONER'S JUDGMENT.

Under the native rule in Oudh an individual or community might possess a heritable and transferable property in the whole village, and might alienate the greater portion to a talookdar retaining, under agreement, "*seer*" land and manorial dues.

The question to be decided is, to what *malikana* is plaintiff—respondent entitled?

He, plaintiff, claims 400 kutcha beegas as *malikana*. He repudiates having received it in gift since annexation.

There is no doubt as to what plaintiff received as *malikana* (proprietary maintenance) in 1245 F. (1837-38,) when he mortgaged his village. He received 50 kutcha beegas of land, a promise of Rs. 100 annually in cash, and the right to collect the village tolls.

These rights he enjoyed for 7 years, or until 1844-45, when the cash payment of Rs. 100 annually was stopped, and in lieu thereof, 50 beegas more of land, were substituted.

From 1845 up to annexation, plaintiff enjoyed 100 kutcha beegas of land and the right of levying the village tolls.

When the British Government took possession of the country, it prohibited the levying of village tolls, and plaintiff pleads that Toolshee Pershad, his fourth cousin once removed, gave him 300 beegas in lieu of his right to collect them.

He obtained no title deed of any sort, neither was his name entered in the jummabundi.

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Defendant declares that he received the 300 beegas as payment for service to be performed.

In my opinion the burden of proving that these 300 beegas are enjoyed as *malikana* rests with plaintiff. For upwards of 18 years after he had executed the mortgage, he never had possession of them. I can find no good evidence as to the terms on which he is said to have received the 300 beegas, there is nothing in the evidence inconsistent with the idea that he received this as wages for service, or that he received them as charity terminable at the pleasure of the landlord.

He gave no consideration in lieu of the 300 beegas. The village tolls are not enjoyed by defendant; they were not abolished by order of defendant. It is the British Government who abolished tolls, and plaintiff's claims on this account, must be against the Government, and not against defendant.

I therefore find that plaintiff has no good title to the 300 kutcha beegas.

ST. G. TUCKER,

March 2nd 1865. *Commissioner.*

Appeal against the order of the Commissioner Khyrabad Division, dated 3rd March 1865.

FINANCIAL COMMISSIONER'S JUDGMENT.

In this case, the Assistant Settlement Officer observed "it is admitted on all hands that plaintiff (appellant) is the old zemindar of the village, and that Toolshee Pershad and Dulla Singh hold the village on a mortgage of many years back executed by plaintiff's brother. The evidence shows that up to annexation, plaintiff used to receive, in addition to some 50 or 60 beegas *seer*, Rs. 100 cash, and *cowree* dues, which he states amounted to some Rs.100 per annum."

The dispute is about the so called *cowree* dues. The Plaintiff asserting that they were the proceeds of tolls reserved to him as proprietor at the time of the mortgage, and in lieu of which he received from defendant (respondent) 350 or more kutcha beegas of land rent—free as malikana. The Commissioner differing from the Assistant Settlement Officer and Extra Assistant Commissioner, found that this land was granted for service, and not as compensation for loss caused to plaintiff by the abolition of the tolls. The Financial Commissioner sees no cause to interfere with the Commissioner's order, but observes that the case shows that under the native rule in Oudh, and individual or community might possess a heritable and transferable property in the whole village, and might alienate the greater portion

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to a talookdar, retaining under agreement his *seer* land and manorial dues.—Appeal dismissed.

R. H. DAVIES,
Financial Commissioner.

(Fincl. Commr's. Cir. No. 1377, *dated 4th July* 1865.)

Phoolman and others, Plaintiffs, versus Baboo Seetla Buksh, talookdar, Defendant.

Claim for under-proprietary right of 5 *biswas and* 10 *biswansis of the whole village of Subursingpoor.*

ASSISTANT SETTLEMENT OFFICER'S JUDGMENT.

A village might remain in the proprietary possession of its hereditary owners for many years after its inclusion in a talooka; a talookdar desiring to acquire the proprietary rights might purchase them from the owners, some of whom might consent to sell, whilst others forbore to do so; consequently *talookdari* is not necessarily the same as complete proprietary possession.

Plaintiffs, Rajkoomar Chuttrees, claim 5½ biswas of the whole village by ancestral hereditary right.

2nd.—Defendant denies their right, and asserts he acquired this portion of the village by purchase from the ancestors of plaintiffs.

3rd.—Case II of this file is connected with this and ought to be read with it.

4th.—From this and the investigation in case II of this file it appears that this village originally belonged to certain Raotars of village Damodapore, and that the ancestors of plaintiffs acquired it from the Raotars by marriage. This was many years ago, the canoongoe says 100, the Rajkoomars say many more. About 70 years ago the Rajkoomars deposited their village in defendant's talooka, and up to 1230 F. paid a fixed jumma for the whole village. In this year plaintiffs sold their share consisting of 5½ biswas in both this village and Goura to defendant's grandfather Drigpal Singh. In the 14½ biswas held by plaintiffs in case II the defendant has admitted their claim, but he does not admit the claim in this case. The deed of sale is produced, dated 1230 F., and contains the names of three men as the sellers who were the respective fathers of the three plaintiffs.

5th.—The only question is, if there was really a sale. The plaintiffs in case II, and putteedars of plaintiffs in this case, distinctly say, that though the sale took place before their time, yet they have always understood that there had been a sale, and moreover that plaintiffs got, in *deedari* tenure, certain lands of the village. The defendant declares plaintiffs have 36 beegahs in *deedari* and that their fathers got this when the sale took place. All the witnesses of the deed of sale are dead, but I have no reason to doubt the genuineness of the said deed. Lastly, plaintiffs themselves have no documentary evidence whatever: for the receipts, they have had recorded, cannot be taken as any evidence whatever in their favor. In short, plaintiffs produce nothing in the shape of a sensible and conclusive reply to defendant's asertion of the

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sale. I consider defendant is right that the deed is genuine, and the claim of plaintiffs must be dismissed.

E. G. CLARK, CAPTAIN,

10th June 1865. *Assist. Settlement Officer.*

N. B.—This decision was upheld in appeal to the Commissioner.

Appeal from Fyzabad Commissioner's order of 24th July 1865.

FINANCIAL COMMISSIONER'S JUDGMENT.

In applying to institute a special appeal the appellants (plaintiffs) simply deny that the sale ever took place. This is a question of fact found in the affirmative by both the lower courts, and the Financial Commissioner therefore declines to admit a special appeal.

The publication of the Assistant Settlement Officer's decision is directed as proving:—

1st.—That a village might remain in the proprietary possession of its hereditary owners for many years after its inclusion in a talooka.

2nd.—That a talookdar desiring to acquire the proprietary rights might purchase them from the owners, some of whom might consent to sell, whilst others forbore to do so.

3rdly.—And consequently that *talookdari* is not necessarily the same as complete proprietary possession.

R. H. DAVIES,

20th September 1865. *Financial Commissioner, Oudh.*

(Fin. Commr's. Cir. No. 1960 A., dated 20th-21st September 1865.)

Syud Mehndee Hoosain, Appellant, versus Syud Akber Ali, Respondent.

In Oudh the law of limitation is express invalidating all possession not held within the 12 years preceding the annexation of the province. Dishonesty in obtaining possession will not prevent the possessor from availing himself of the provisions of this express law.

The facts of this case are as follows:—

The village in dispute Poorwa Chundurmun belonged to Fuzl Ahmed who had four sons:—

1.—Ghoolam Jafir.
2.—Ali Ahmed.
3.—Hyder Hoosain.
4.—Mehndee Hoosain.

Mehndee Hoosain is the plaintiff; Akber Ali, son of Hyder Hoosain, defendant.

The estate was never divided. Fuzl Ahmed engaged with Government for the revenue, and managed. Ghoolam Jafir did the same during his father's life. Akber Ali does so at present.

The plaintiff's father died in 1229 Fusli. Since then the plaintiff has never obtained the share he now claims, but has held certain lands in lieu of maintenance.

The court of first instance decided in favor of plaintiff's claim on the ground that his right by inheritance, though in abeyance, was never extinguished; and that so long as he was content not to demand his share, no cause of action arose.

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This order was reversed by the Commissioner who held that plaintiff's claim was barred by the Statute of Limitation.

It is proved that there is in the family an acknowledged custom that the eldest son shall inherit a one and a half share whilst the others obtain only one share each. This incident shows that the estate was not indivisible. It is further clear that by the Mahomedan law, as well as by the custom of the family, the members are entitled to shares.

But it is shown that possession has hitherto been quite at variance with law and custom. The person who has managed the estate on behalf of the co-sharers and entered into engagements for payment of the land revenue has kept all the profits to himself and failed to account to the co-sharers. That he was thereby guilty of fraud and embezzlement may be true, and that, through such fraud, he should, under the Statute of Limitation, be enabled to secure the property for himself, improved as it is under the British administration, may be regretted; but the sole legal question appears to be—was his possession, which endured through the term of limitation, adverse to that of the plaintiff or not?

The following quotation from a judgment lately given by the Chief Justice of the Calcutta High Court seems to be in point:—

"Speaking of possession and prescription the Civil "law says.—'To acquire prescription, it is necessary to have "possessed honestly and fairly, that is, that the possessor "must have been persuaded that he had a just cause of pos- "session and must have been ignorant that what he possess- "ed did belong to another person. And this integrity is "always presumed in every possessor, if it is not proved that he "has possessed with a bad conscience knowing the thing "to be another's.' (Domat's Civil Law 2208 page 876.) I "do not mean to say that the fact of obtaining possession "dishonestly or knavishly will prevent a man from availing "himself of an express law of limitation; on the contrary "it appears from a note in the same book that it will not. "(page 2209.)

"The Law of limitation in this country being express "dishonesty in obtaining possession will not prevent the pos- "sessor from availing himself of the provisions of that law, "but the law cannot relieve him from the charge of dis- "honesty."

Now, in Oudh the law of limitation is express, invalidating all possession not held within the twelve years preceding the annexation of the Province. Whether this law is well or ill suited to people unaccustomed to similar restraints is not a question for the judgment of this Court. Adopting the interpretation of the law as given by the Calcutta High Court the Financial Commissioner must rule that the claim of the plaintiff is barred by limitation.

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DECREE.

Special appeal dismissed.

R. H. DAVIES,

Financial Commissioner, Oudh.

(Finl. Comr's. Cir. No. 1328 A., dated $\frac{19th}{21st}$ July 1866.)

Teekum and others, versus Hushmut Ali.

ASSISTANT SETTLEMENT OFFICER'S JUDGMENT.

Under the Native Government, village landholders of villages in talookas, could mortgage their rights, and, having subsequently redeemed them, they are entitled to count against the talookdar the possession consequently enjoyed by the mortgagors, as their own possession.

Teekum and others, the hereditary zemindars of Koothowan, claim the sub-settlement, and Deo Sing of Raipore claims a lien on eleven biswas of the entire village as mortgaged to him by the hereditary zemindars.

It appears that the zemindars of Koothowan had some thirty-five years ago, mortgaged the village for Rs. 2,206 to the proprietors of Nukooa, and redeemed the mortgage in 1264 Fuslee, by paying up the amount awarded by arbitrators, Rs. 2006: this sum they borrowed from the plaintiff Deo Sing of Raipore, to whom they mortgaged eleven biswas of the entire village. The plaintiff Teekum and his co-parceners now sue for the sub-settlement on the grounds that the mortgagees, (the proprietors of Nukooa) their *locumtenens*, had always paid the revenue direct.

The defendant's agent admits, that the mortgagees generally held the lease from his client. From his cross-questioning the witnesses for the plaintiff it will be seen that he attempts to disprove the mortgage in the hope that if the mortgage is not proved, the fact of the Nukooa zemindars having generally held the lease will go towards proving that they merely held the lease as strangers, in such case the old proprietors not having had possession for upwards of twenty years, would not be entitled to the sub-settlement now. As the plaintiff Teekum and his co-parceners have clearly proved the mortgage and its redemption, they are entitled to the subsettlement. The court, accordingly, decrees the sub-settlement of Koothowan to Teekum and his co-parceners, and possession of 11 biswas to Deo Singh of Raipore, as mortgagee under deed of mortgage, dated 1264 Fuslee.

His rights will be particularized when the *khewut* is prepared.

O. WOOD,

30th September 1864. *Assistant Settlement Officer.*

Appeal against the order of the assistant Settlement Officer, dated 30th September 1864, ordering, that plaintiffs, having clearly proved the mortgage and its redemption are entitled to the sub-settlement

GROUNDS OF APPEAL.

1. The village has been in the talooka for 75 years. Talookdar had full power to hold kham or otherwise. The

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Nukooa zemindars used to hold as moostajirs. Respondents did not hold the kuboolyut; therefore, they could not mortgage, and appellant knows nothing of the mortgage. There is a discrepancy in the statements of witnesses both with regard to the nature of the transaction and amount paid. The mortgagees, if they had been such, would have been settled within 1264. When respondents were settled with in 1264, appellant got 10 per cent. No mortgage deed was produced. Respondents did not hold the sub-lease for 35 years before annexation.

Appellant's agent states:—

"The Nukooa zemindars got the lease, because appellant "had full power to do as he liked. The village was incorpo- "rated by order of Government. I cannot mention any years "in which there were *kham* collections. The Nukooa men "had the *theka*."

The Respondents are the original zemindars, the village was incorporated in the talooka by order of Government and not acquired by mortgage or purchase. Respondents mortgaged their rights to the Nukooa zemindars, 30 or 40 years ago, but redeemed at annexation. It is clear, that the Nukooa men held the lease as mortgagees. Appellant's agent cannot mention any year in which *kham* collections were made. Appeal dismissed.

J. REID,,

11th May 1866. *Officiating Commissioner.*

The Commissioner's order was upheld in appeal to the Financial Commissioner. The case shows, that village landholders of villages in talookas could mortgage their rights under the native Government.

R. H. DAVIES,

17th September 1866. *Financial Commissioner, Oudh.*

(Finl. Comr.'s Cir. No. 1725 *A., dated* $\frac{17th}{18th}$ *September* 1866.)

Outar Singh and others, versus Ali Hamid.

SETTLEMENT OFFICER'S JUDGMENT.

Under the native Government the party contracting for the revenue was not necessarily possessed of the proprietary rights.

Village landholders could mortgage their rights after the inclusion of their villages in talookas. Such mortgages were not necessarily equivalent to sales, but, of

Plaintiffs, Raikwars, claim the whole of villages Serai Ali and Gooretha, in proprietary right, by virtue of hereditary ancestral right, and by right of redemption of mortgage.

2. Defendant is a Mussulman, one of the Syuds of Jurwul, and he is a talookdar, but holds no sanad. There can be no doubt of defendant being a talookdar, for his previous history proves this fact conclusively, but as he does not hold a title-deed or sanad from Government, his proprietary right can be called into question.

3. The facts are simply these.—In 1203 Fusli or

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63 years ago, the ancestors of plaintiffs mortgaged these villages to defendant's ancestor, and the defendant's family held possession from that date up to 1259 Fuslee, when defendant let plaintiffs redeem their ancestors' mortgage; and from date of redemption up to now plaintiffs have held possession. Besides this, plaintiffs assert, they held the kuboolyut from 1260 Fuslee to annexation of this province by Government, but not since then.

right, redeemable, and where redemption did not take place this was through the wrong-doing of the talookdar, or through the inability of the mortgagors to pay the money required.

4. Defendant admits the statement of the plaintiffs to be correct, except so far as that they held the kuboolyut; for this, he says, they never did. But he pleads that though plaintiffs paid him the redemption money yet there is another branch of the same family who ought to have paid him a portion of the redemption money, and not have let plaintiffs pay all the amount.

5. It does not signify if plaintiffs held the kuboolyut or not, nor does defendant's plea of having received the redemption money from one instead of two branches of the same family, affect the case at all.

6. Plaintiffs mortgaged their proprietary right, so if they redeemed any right it must have been the right which had been mortgaged, unless there was any specific agreement to the contrary between the parties concerned, at the time of the redemption taking place. There does not appear to have been any such agreement, and therefore plaintiffs must be considered to have redeemed the proprietary right; and, as defendant does not hold a sanad, plaintiffs are the best entitled to the village.

7. At the time of redemption taking place, defendant had the power of letting plaintiffs redeem the whole or not as he liked. He was entitled only to his money, and this being repaid him, he has no lien on the village. Moreover, both branches of the same family had a common ancestor, and the mortgagors were two sons of the one common ancestor, and they were not separate then, though they became separated 12 years afterwards. But, added to this, the head of the other branch, by name Jaiputr Singh, mortgaged in 1258 Fuslee, his half of the village to plaintiff No. 2. and therefore, when, in 1259 Fuslee, the plaintiffs redeemed the village, they had the right of redeeming the whole village, for they held half in their own right, and half by mortgage. As far then as the defendant is concerned, the plaintiff had a right to redeem the entire village.

8. As the plaintiffs claim village Gooretha also, and the circumstances are identical with the circumstances in this claim, this case will be considered as the leading one, and this judgment will do for Gooretha as well as this village; a note to this effect being recorded in the Gooretha file.

9. Considering, then, that plaintiffs are the descendants of the original proprietors of the village, and that they redeemed the village from mortgage in 1259 Fuslee, and have held possession ever since; and the defendant, though a talookdar, yet does not hold a sanad, the plaintiffs are entitled to

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the settlement of the village as proprietors. But, inasmuch as defendant holds the kuboolyut, and I now considered it should henceforth be with plaintiff, this case, after term of appeal has expired, must be sent up to higher authority under Ruling III for sanction to the change of kuboolyut.

DECREE.

Proprietary right in favor of plaintiffs and their co-sharers and all who can establish a claim to share with them in the whole village Serai Ali. Case to be submitted to higher authority, for sanction to change the kuboolyut, after term of appeal has expired.

EDGAR G. CLARK, CAPTAIN,

12th June 1866. *Settlement Officer.*

The settlement with the decree-holders was sanctioned. The case gives the clearest possible demonstration that the party contracting for the land revenue under the native Government *(i. e.* holding the *kuboolyut)* was not necessarily possessed of the proprietary rights. It also shows that village landholders could mortgage their rights after the inclusion of their villages in talookas, and that such mortgages were not necessarily equivalent to sales, but of right redeemable, and that where redemption did not take place this was through the wrong-doing of the talookdar or through the inability of the mortgagors to pay the money required.

R. H. DAVIES,

29th September 1866. *Financial Commissioner, Oudh.*

(Finl. Comr's. Cir. No. 1782, *dated 29th September* 1866.*)*

Mahomed Hosain Khan, Special-Appellant, versus Tikaet Rai, Special-Respondent.

In decrees for redemption of mortgage no interest should be decreed, in addition to the usufruct, after the 13th August 1860 whenever the land mortgaged is in the possession of the mortgagee.

This is a question as to the date up to which interest due under the terms of deeds of mortgage can be decreed.

It is shown that although the special-respondent altogether denied the validity of the alleged mortgage, he did not then claim redemption. The lower courts have found the mortgage valid and decreed the equity of redemption to special-respondent. As the special-respondent did not claim to redeem the mortgage in 1859, it cannot be argued that the interest accruing under the terms of the deed has accumulated in spite of his efforts to repay the principal of his debt.

It is clear, however, that owing to the unavoidable postponement of adjudication in mortgage suits, in consequence of their coming under the jurisdiction of the settlement courts, mortgagors may be exposed to great disadvantages, as it is no fault of their own that their claims are not more speedily heard. Under the Chief Commissioner's circular 119-2917 of the 13th August 1860, it is ordered that "when

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a regular settlement is immediately coming on in a district, or the case is of an intricate nature, and, generally if no hardship is caused by delay, the claim should lie over for adjudication by the Settlement Officer." And, practically, claims to redemption are everywhere referred to the Settlement courts.

The Financial Commissioner, therefore, rules that wherever the land mortgaged is in possession of the mortgagee, no interest shall be payable under the terms of the mortgage deed in addition to the usufruct, after the 13th August 1860.

DECREE.

The decree of the Commissioner of Seetapoor is so far modified that interest will be calculated according to the terms of the mortgage bond up to the 13th August 1860, and will be payable to the special appellant previous to redemption.

R. H. DAVIES,

Financial Commissioner of Oudh.

(Finl. Comr's. Cir. No. 46 of 27th May, 1867.)

Sheodyal & Sheogopal Special-Appellants, versus Duttoo Singh, Special-Respondents.

Whenever owners were excluded from the summary settlement expressly on account of complicity in rebellion, they are debarred by sentence of confiscation from recovering their former rights.

This is a special appeal from the order of the Commissioner of Lucknow, reversing that of the Settlement Officer of Durriabad decreeing the proprietary rights in mouza *Niolie* to Sheodyal &c., Kayeths (special appellants.)

The facts of the case are undisputed. The Kayeths, who are also Canoongoes, held the village on mortgage for a period of 20 years previous to annexation. Under Act XIII of 1866, their title would be unassailable.

The lower appellate court reversed the Settlement Officer's order on the ground, that the Government records show that the rights of the Kayeths escheated to the Government under the proclamation dated 15th March 1858.

The document relied upon is a memorandum by Major Barrow, Special Commissioner of Revenue, dated the 6th November 1858, which runs as follows:—

"I doubt Sheodyal's good faith. I think he has justly "lost his village (if it is his) by his absence. He was a "Government servant, and his apology that he could not "get to Lucknow in May last, is not admissible.

"Duttoo Singh got the settlement in 1264 Fuslee, as being the original proprietor; he came into Lucknow and was re-settled with. This case should stand unreversed I think."

On this the Chief Commissioner wrote, "I quite concur; the settlement should not be reversed I think."

In the judgment of the lower court the claim of the Kayeths is barred *ab initio*, it being shown by the foregoing memorandum that the authorities especially empowered, ex-

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cluded them from possession of their former estate, and thereby affirmed and perfected the confiscation proclaimed on the 15th March 1858.

It is necessary to consider the question thus raised. After exempting certain persons specially by name, the proclamation of the 15th March states that, "the proprietary right in the soil of the Province (of Oudh) is confiscated to the British Government, which will dispose of that right in such manner as to it may seem fitting."

This declaration became law under the Indian Council's Act.

The proclamation proceeds to promise that "the lives and honor" of those persons who make immediate submission to the Chief Commissioner, "shall be safe, provided that "their hands are unstained with English blood murderously "shed. But as regards any further indulgence which may "be extended to them and the condition in which they may "hereafter be placed, they must throw themselves on the "justice and mercy of the British Government."

It must be observed that the required submission was to be *immediate*, and to be made to the Chief Commissioner. The Government assumed the power to dispose of proprietary rights as to it might seem fitting.

The proclamation by the Queen in Council, dated 1st November 1858, "promises unconditional pardon, amnesty, "and oblivion, to all (not being of certain excepted classes) "in arms against the Government on their return to their "homes and peaceful pursuits," and it is added that "these "terms of grace and amnesty should be extended to all those "who comply with their conditions before the 1st day of "January 1859."

It is to be observed that in neither of these proclamations, is there any promise to restore the *property* of persons making their submission.

Consequently the confiscation of rights in the soil is not necessarily affected by either proclamation.

But in paras. 13 and 14 of the Foreign Office letter No. 5209, dated 13th September 1858, it is declared that "in the Governor General's opinion, there can be no doubt "that a person, not being of the excepted classes, who may "submit himself, will save his property, but that the pro-"clamation does not entitle an owner to restitution after "actual adjudication, though such sentences may be recon-"sidered; and that when the confiscated property has been "awarded to others, reconsideration cannot take place."

Again, in the Foreign Office letter No. 519, dated 18th November 1858, to the Government of Bengal, and made applicable to Oudh, it is stated that "if, after it has become "certain that the leaders have knowledge of the offer of "pardon, they shall continue to commit acts of rebellion "and to oppose the authority of the Government, force may "be used against them. The Civil authorities are not in "such a case debarred from using force by the fact that the

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"terms of grace and amnesty are extended to all who comply "with the conditions before the 1st of January 1859."

It must be held therefore:—

1st, that, generally, rights in the soil legally passed to the Government in virtue of the confiscation which so far as the owners were concerned was as conclusive as a formal adjudication in each case.

2ndly, that restitution might or might not take place where a rebel made submission before the 1st of January, except where the property had been granted away.

3rdly, that where in spite of the offer of pardon, rebels continued to oppose the authority of Government, the terms of the amnesty were null and void.

These conclusions are drawn from the instructions given to the Civil Administration in Oudh exclusively. But there is a further instruction addressed to His Excellency the Commander-in-Chief who in person had, at the time, taken the field in Oudh, contained in the Foreign Office letter No. 4171, dated 1st November 1858. This document was communicated to the Chief Commissioner for his information and guidance; it has now for the first time come before the Financial Commissioner, who holds that it is the best exponent of the intentions of the Government. It contains the following passage:—

"It is likely that advantage will be taken of the de- "claration that the terms of grace and amnesty offered in the "proclamation, should be extended to all who comply with "their conditions before the 1st of January next, and that "attempts will be made to temporize and negotiate as to the "terms of submission before real submission is made.

"Should any invitation to surrender which your Ex- "cellency may address to a rebel be met in this spirit, your "Excellency will not consider that your hand is therefore "to be stayed. It is right that those who being in distant "parts of the country, out of the reach of our protection, or "under the coercion of powerful neighbours, are unable to "take immediate advantage of this offer of mercy, should "have the full benefit of the large and prolonged indulgence, "which Her Majesty graciously holds out to them. But it "is not to be borne that others who have no such cause for "delay should turn this indulgence into an opportunity of "trifling with the clemency of the Crown, of evading its "authority, or of planning new resistance to its troops."

This instruction was binding on the authorities in Oudh. It is further mentioned in the same letter that "Major Bar- "row, the Civil officer attached to His Excellency's Head "Quarters, is in possession of all the information which the "Government has acquired respecting the conduct of indi- "vidual leaders."

Major Barrow, was also the Special Commissioner of Revenue, and empowered to make a summary settlement of the revenue throughout the Province.

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Wherever this settlement was made with a talookdar it carried with it under the Government orders of the 10th October 1859, the proprietary right to the villages settled.

Wherever also the proprietary right was granted away under sanad, the confiscation of the owner's rights became final and irrevocable.

It is to be observed that in making the summary settlement it was in the power of the Special Commissioner to replace the owners of villages in possession of their landed rights or not at his own discretion, subject to the confirmation of his proceedings by the Chief Commissioner, and it appears that cases occurred in which he deliberately refused to do so, on the ground that the rebellion of the owner was of such a character and duration as to preclude the restitution of his estates.

The question now before the court, is whether the Special Commissioner's refusal, confirmed by the Chief Commissioner, to make the summary settlement with the owner of a village, is legally equivalent to a sentence of confiscation, and bars such owner from recovering his rights by judicial decree.

An almost universal sentence of confiscation having been pronounced, the case of every village in Oudh came under re-consideration when the summary settlement was made. All proprietary right in the soil being at the disposal of the Government, it was competent to the executive authorities to determine in each case whether the confiscation should be annulled, and the owner restored or not. The revision of the sentence of confiscation necessarily made at the summary settlement cannot form the subject of judicial proceedings. It must be held to be final.

The Financial Commissioner therefore holds that wherever it is shewn that the owner or owners of a village were excluded from the summary settlement expressly on account of complicity in rebellion, they are debarred by sentence of confiscation from recovering their former rights.

Special appeal dismissed.

R. H. DAVIES,

25th June 1867. *Financial Commissioner, Oudh.*

(Finl. Commr's. Cir. No. 59, dated 27th June 1867.)

Bhawani Dial Singh, versus Mehput Singh and Baboo Jeydut Singh.

A "*urmsana*" mortgage executed before the 13th February 1844 cannot be redeemed when no mention is made in the deed of a period within which redemption may take place.

The Financial Commissioner is of opinion that the equity of redemption is barred under Section 2 of Act XIII of 1866, and though it is true that cases like the present were not in immediate contemplation when that Act was passed, they were not excepted, and the Financial Commissioner doubts if the Legislature would now consent to except them. The decree of the Extra Assistant Commissioner is modified accordingly.

R. H. DAVIES,

Financial Commissioner, Oudh.

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N. B.—The point at issue was whether a mortgagor could claim the equity of redemption with regard to a "purmsaua" mortgage (described in Settlement Commissioner's circular No. 45, dated 27th September 1864) executed prior to 13th February 1844, when no mention is made in the deed of mortgage of a period within which redemption may take place.

(Finl. Commr.'s Cir. No. 98, dated 6th November 1867.)

Bisheshur Pursad, Petitioner,

The mere hearing of the parties for and against an application for review is not equivalent to the admission thereof.

Following the judgment of the Full Bench of the Judges of the Calcutta High Court, dated 11th September 1866,* this petition for leave to appeal to Her Majesty in Council, preferred ten months after the issue of the decree of this Court is rejected. The mere hearing of the parties for and against an application for review is not equivalent to the admission thereof. There must be a distinct order for the admission of the case to review, or an alteration of the original order in itself proving such admission.

20th *November* 1867. R. H. DAVIES,

Financial Commissioner, Oudh.

The Honorable Sir Barnes Peacock, *Knight, Chief Justice*, and the Honorable C. B. Trevor, the Honorable G. Loch, the Honorable L. S. Jackson, and the Honorable A. G. Macpherson, *Judges*.

The Maharajah of Burdwan, Petitioner,

Baboos Jugdanund Mookerjee and Chunder Madhub Ghose for Petitioner,

This case was referred to a Full Bench by Mr. Justice L. S. Jackson under the following order, dated 19th *May* 1866.

The question before me is whether the present appeal to Her Majesty in Council, ought to be allowed to proceed, the circumstances being that the appellant was a respondent in this Court, against whom a Divisional Bench pronounced a judgment. An application to review that judgment was afterwards made. It was admitted to argument by the learned judge who had written the judgment, and afterwards, coming to be argued before the Divisional Bench which had decided it, the application was rejected. The petition of appeal to England does not specifically state whether the appeal is against the original judgment pronounced, or against the judgment on the application to review, or against both. If the appeal be directed against the judgment originally pronounced, then much more than the period of six

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months allowed by the order in Council of 1838 has expired, and the application to appeal to Her Majesty was, in fact, put in precisely as the period of 6 months after the second judgment was about to expire.

There is already a decision of three judges of this Court, including the Officiating Chief Justice, in a case reported at page 13 Miscellaneous Rulings, 1 Weekly Reporter, in which it was held that in a case similar to this, the time for making the appeal (six months) runs from the date of the order rejecting the application for review.

That decision has since been followed in at least one case on the miscellaneous side of this Court, and I myself was certainly at one time of opinion that, that decision was correct in principle. On further consideration, the question appears to me to be one of great doubt. The ruling in that case does certainly seem to be opposed to the express terms of Her Majesty's order in Council, because, in the case in question as well as in the present case, although it may be that further arguments were adduced and possibly new reasons assigned in the judgment of the learned judges, yet, in fact, the decision passed on the second occasion was essentially the same as the decision passed on the first occasion.

The Civil Procedure Code provides for the hearing of an application for review in cases where the appeal to Her Majesty in Council has been preferred, provided that the proceedings shall not have been transmitted to England. It is therefore quite open to parties to carry on proceedings of review and proceedings of appeal to England at the same time; and therefore a party who has applied for a review of this Court is in no way debarred from proceeding with his appeal to England.

Under, therefore, circumstances like the present, it appears to me very doubtful whether we are not proceeding beyond the powers entrusted to this Court by the Letters Patent, and contravening the order in Council in admitting the appeal after the lapse of six months from the date of the original judgment.

Upon the whole, I incline to the opinion that where additional evidence has been let in, or where the Division Court, modifying its view of the case, has given its decision on grounds other than those on which its original decision was based, there has been in effect a new judgment from which a new period of six months will run; but that where the judgment on hearing the review has merely affirmed the first judgment, then there is no new period.

Considering this point, therefore, extremely doubtful, and also considering it one of great importance, I think it better that the matter should be referred to a Full Bench, and it will be referred accordingly.

Judgment of the full Bench. The charter of the High Court allows an appeal to the Privy Council "in any matter not being of criminal jurisdiction, from any final judg-

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ment, decree, or order of the said High Court of judicature at Fort William in Bengal made on appeal."

The question is whether an order of a Division Bench, rejecting an application for a review of a judgment passed on appeal, is a "judgment made on appeal." In this case a Division Bench heard a special appeal and then passed a decree in the case. An application was afterwards made for a review of the judgment. Under section 378 of the Code of Civil Procedure, no review of judgment ought to be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree of which a review is applied for.

The application was made to a single judge, and he thought it reasonable that the opposite party should be summoned. When the case came on to be heard, the Court rejected the application for the review; in other words they would not grant a re-hearing of the appeal.

That was not an order made on appeal, but merely an order made on application to the Court to review their own judgment. If a review is admitted, then, under section 380, the case is set down to be re-heard, and the order of the Division Bench upon the re-hearing is a new decree, whatever may be the result of the re-hearing.

But as it is, the Court merely rejected an application to review their own judgment; and that rejection is not an order made on appeal. Consequently the Court is not in a position to admit an appeal against that order. It cannot admit an appeal against the original judgment of the Division Bench, in as much as the petition of appeal was not presented within the period of six months prescribed by the rules of Her Majesty in Council on the 10th April 1838, *Section 1.*

There is no hardship in the case. The learned judge, who referred the case, has clearly pointed out that an application for review of judgment may be made after an appeal has been preferred to Her Majesty in Council, and before the proceedings in the suit have been transmitted (*see* Act VIII. of 1859, Section 378.)

If the parties choose, they may apply specially to Her Majesty in Council, but we have no power to admit the appeal.

*(Finl. Commr's Cir. No.*105. *dated 26th Norember* 1867.*)*

Neerunjen Singh, Defendant-Appellant, versus Mahdoo Singh and Jeet Singh, Plaintiffs-Respondents.

CLAIM.—A five biswa share in mouza Burkhera, district Hurdui.

The following extract from the judgment of the Commissioner of Seetàpore is forwarded to all Commissioners in Oudh for information, with the remark that the Financial Commissioner concurs in the Commissioner's ruling.

R. H. DAVIES,

30*th November 1867.* *Financial Commissioner, Oudh.*

The officials of the *nawabi* were not competent to make a permanent transfer of the title of a revenue defaulter unless they prevailed on him to execute a formal deed

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EXTRACT OF COMMISSIONER'S JUDGMENT.

" The parties in this case are connected by marriage, and appellant originally obtained a share as a marriage portion apparently, but the five biswas in dispute he states he had long held under mortgage, and he acquired them by purchase in 1239 H. paying, what in those days was a very heavy price indeed, Rs. 1,750 and 475 maunds of grain. Appellant held from 1239 H. till 1247 H. when he fell into arrears, and the *Chukladar's* relative transferred the five biswas and with them the deed of sale to respondents who held for five or six years, and certainly within limitation; in 1253 or 1254 appellant recovered, and has held uninterruptedly ever since. Respondent alleges that he was forcibly ousted, and appellant that he recovered possession by redeeming a mortgage for Rs. 117. Neither allegation was cleared up; both parties produced deeds of sale purporting to be originals and the assessors to whom the question was referred found that the deed produced by respondent was the original; the grounds for these findings were however hardly conclusive as the interpolations to which the assessors took exception in the deed produced by appellant were not material or such as were likely to be found in a forged document, and the deed produced by the appellant bore the signature of the canoongoe, which was attested by his son. No evidence was taken as to the other signatures to either deeds, though in all probability reliable evidence might have been found. Unsuccessful endeavours have been made here *to* find the heirs of the attesting witnesses. But, setting aside the authenticity of the deeds, a very important point is raised and assumed by the Extra Assistant Commissioner in this case *i. e.* that when a proprietor fell into arrears a *hakim* had power to transfer his proprietary right permanently to any one who paid up these arrears. This point has been specially enquired into by order of the Financial Commissioner in the Seetapoor district, and it was proved that a proprietor dispossessed by a *Chuckladar* for arrears had a right to be replaced in possession whenever he liquidated these arrears, and it has been held both by this court and by the Financial Commissioner that a mere order of a *Chuckladar* has no legal force. In this case the title-deed was transferred not by the *Chuckladar* but by one Maharaj Singh, who, respondent says, was the *Chuckladar's* nephew; and as appellant recovered possession in 1253 or 1254 and held uninterruptedly till annexation, respondent making no claim, the inference, in the absence of any proof to the contrary, is that appellant recovered possession by legitimate means, and that respondent was either not held to have acquired any valid title by the transaction of 1247 F. or that any lien he then acquired had been satisfied. The transaction of 1247 is not very clear and the deposition before the Settlement Officer in the claim to the entire village is not very explicit, though the title-deed mentioned was apparently the deed of sale of the five biswas which appellant stated the

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gave to the *Chuckladar*: here, however, appellant distinctly states he mortgaged the five biswas, and his admission that he gave the title deed to the *Chuckladar* cannot he held to be an admission of the permanent surrender of the rights acquired by him under the deed of sale. *Prima facie*, then, the proceedings of Maharaj Singh, did not permanently extinguish the rights of appellant, and it is for respondents to prove that they did, and further that appellant was not restored in 1253 or 1254 by lawful means. As already stated, the Extra Assistant Commissioner assumes that the *hakims* of the time having transferred a village for arrears, the transferree thereby acquired full proprietary right, but it has been generally held both in Hurdui and other districts that such a transferree was a simple *moostajir*. It is therefore necessary to determine who Maharaj Sing was, had he power to transfer proprietary right and had the transfer of 1247 F. the effect of permanently extinguishing the right of appellant ?

The Officiating Settlement Officer finds that Maharaj Singh was the nephew and naib of the *Chuckladar* Dilaram, and as such was competent to transfer a defaulter's title temporarily at all events, but not permanently unless he could get the defaulter to execute a formal deed of mortgage or sale which was not done in this case."

J. REID,
Offg. Commissioner.

(Finl. Commr.'s Cir. No. 106, *dated* 30*th November* 1867.*)*

Baboo Surubjeet Singh, Defendant-Appellant, versus Thakoorain Sookhraj Koer, Plaintiff-Respondent.

CLAIM.—Settlement of Mouza Asoghpoor, talooka Deotaha, in virtue of proprietary right.

COMMISSIONER'S JUDGEMENT.

Raja Ram Singh had two sons—(1) Raja Dutt Singh ancestor of the Gonda rajas, (2) Bhaya Bhowani Singh.

Bhaya Bhowani Singh got 32 villages which were styled the Deotaha talooka;* he was succeeded by Bulwunt Singh who was adopted by the then raja of Bhinga and held both the Deotaha villages and the Bhinga estate.

* See Deputy Commr., order dated 25 January 1865.

Bulwunt Singh had 3 sons—

1. Sirdowun Singh who got the Bhinga estate, zilla Baraich.

2. Dirgbejay Singh who got the Gonda or Deotaha estate.

3. Singara Singh who got nothing.

Dirgbejay Singh was succeeded by Juggut Singh who got 10 more villages. He adopted *Kali Pershad* son of Sheo Singh who succeeded his father Sirdowun Singh in the Bhinga estate.

Baijnath who claimed *Mouza Sohunpoor* deposed on 1 th December 1864 before the Deputy Commissioner Gonda, that, in 1253 F. when he and his brotherhood were plundered by Gya Pershad, Canoongoe, he ran away to Bhaya Kali Pershad to Bhinga; that he asked Kali Pershad to take the village;

Where the full proprietary rights have been conferred on an individual by the Government order of the 10th October 1859 the title of any other person to those rights has been annulled. The exception in favor of "inferior zemindars and village occupants" does not cover a person who formerly enjoyed only the full proprietary right. No relative of a talookdar can obtain a sub-settlement unless the mehal has been held at some interval under distinct revenue engagement with the Native Government.

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he at first declined, but afterwards *wrote to his karinda at Deotaha* to take the village into cultivation as seer.

Goorsahai putwari (since 1247 F.) deposed in the same case, that, in 1264 the village was settled with the talookdar of Bhinga, but managed separately by Bhaya Kali Pershad Singh. Hurpershad and Baijnath, claimants in that case (summary settlement) in September 1865 (Thakoorain Sookhraj Koer, versus Baboo Ajeet Singh &c.,) in which they appeared as rival claimants to the thakoorain, admitted that the village was founded by their ancestor under a clearing lease from Futteh Singh ancestor of Juggut Singh.

After Dirgbejay Singh, his widow held up to 1243 F. and after her *Kali Pershad* of whom the respondent Thakoorain Sookhraj Koer is the widow.

In 1244 F. Durshun Singh, Nazim, defeated Sheo Singh (who held the Bhinga estate) but granted him the kuboolyut of both the Gonda and Baraich (*i. e.* Deotaha and Bhinga estates on condition that he would never fight against him. But the estates were managed and held to all intents and purposes quite distinctly: the Deotaha estates (zilla Gonda) being administered by Bhaya Kali Pershad, adopted son of Juggut Singh, up to 1263 F. (annexation.)

At annexation Bhaya Kishen Dutt Singh was the talookdar of Bhinga, while the respondent, Thakoorain Sookhraj Koer, held the Deotaha estate in succession to her husband, who died 3 or 4 months before annexation.

In 1264 F. the settlement was made in the Baraich district with Bhaya Kishen Dutt Singh, and the Gonda (*i. e.* Deotaha) estate was included in his kuboolyut, and was in his kuboolyut when the order came to confiscate half his estate. This was in June 1859 A. D. (see special Commissioner's letter No. 2803, dated 20 June 1859.) The property confiscated consisted of the Deotaha villages yielding a jumma of Rs. 7194, and 138 villages of the Bhinga (zilla Baraich) estate yielding Rs. 15,398. The remainder of the Bhinga (zilla Baraich) estate remained with Bhaya Kishen Dutt Singh, who has since died, and was succeeded by his son, a minor. The Bhinga estate is now under the Court of Wards.

Rather more than 2 months after the order for confiscating half the Bhinga estate was issued, the Thakoorain (respondent) remonstrated against the order bestowing the confiscated property on Shahzada Sheodeo Singh, on the ground, that the Deotaha villages (34 khalsa and 8 maafee) were her property. No enquiry was made into her claims, but the following order was recorded on her petition of the 29th August 1859. "*Sail ko fahmaish ho kih illaka Deotaha "ka iwaz khair khwahi Shahzada Sheodeo Singh ko inayat hua, "ab kuch hukm nahin ho sukta hai*" (dated 30th August 1859.)

On the 24th November the following order was passed in appeal by Mr. Commissioner Simson on the Thakoorain's plaint. "*Aj yeh appeal pesh hua, zahir hai keh mutabik khud "ikbal mukhtar i sailah keh jub Thakoorain Ranee Juggut "Singh ki margayi to yeh illaka Kishen Dutt ki kuboolyut "men hogaya, na kubli Kalipershad ki kuboolyut men raha hai, "na is Thakoorain sahibah ke kuboolyut men raha, to malum "nahin keh is ka usl men wirasah Juggut Singh ka malik Kali*

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" Pershad thu ya nahin, lekin dus bara baras hue keh Thakooratn " Juggut Singh ki murchuki, jab se illaka Kishen Dutt Singh " ke pas hai; jo kuch hua us wakt hua, aj ka nahin; khulasah, " hal men Kishen Dutt ki kuboolyut men raha, wo Kishen Dutt " ka illaka zabt hua, lehaza, hukm hua keh appeal na manzoor."

On the 8th October 1859 the Thakoorain gave in 2 petitions to the Deputy Commissioner of Gonda; in one begging that as the Deotaha illaka had always been hers, she might get the lease of the same; in the second, she claimed her talooka as her own, her allegations being identical with those which she lately urged before the Deputy Commissioner of Gonda. On both petitions the following order was recorded. *" Hukm hua jo keh bund-o-bust iska ho " gaya hai is liye urzi haza dakhil duftur ho."*

On the 12th idem the Thakoorain made another effort, but the same order was passed on this application.

The Deotaha villages were not after all bestowed on Shahzada Sheodeo Singh; orders were issued that they should be settled with the *mokuddums*. After this the villages were given to loyal grantees, viz:

	Villages.	*Jumma.*
Baboo Ajeet Singh, ...	36	5422
Dwarka Pershad, ...	3	935
Man Singh, Resaldar,...	1	138
Baboo Surubjeet Singh, ...	1	535
Ghesa Doobey, ...	1	614
	42	

The Thakoorain's claim is for 46 villages. The above list accounts for 42—of the remaining 4, one is leased to the Maharajah of Bulrampoor, and 3 were settled with Thakoorain Sookhraj Koer, but the settlement was cancelled, and they are now settled with the heirs of the mafeedars.

The point at issue is "was the Deotaha illaka the pro- "perty of the respondent, Takoorain Sookhraj Koer?"

This point was decided in the Thakoorain's favor by the Deputy Commissioner of Gonda. The Commissioner objected to the irregularity of the lower court's procedure, and directed that a separate case should be made out for each village in the talooka.

In the present case the Thakoorain was the plaintiff, and Baboo Surubjeet Singh, loyal grantee the defendant.

Mouza Asoghpoor is one of the list of the 46 villages composing the Deotaha estate, given in by the Sudder canoongoe of Gonda.

The plaintiff, to prove her possession and management of the Deotaha estate, put in, besides receipts and other documents, 2 letters *(a)* from Bhaya Kishen Dutt to Bhaya Kali Pershad dated Phagun badi 3,1263 F. to the effect that the latter could, if he pleased, get his villages separately settled, but that he had better leave them to be settled with his (Kishen Dutt's) talooka. Then adde *" Apka kubza " ikhtiyar men illaka hai jas hamesha se bahal chala awat*

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"hai, taisa ubho badastur bana rahes, jo dena hakimi thahre "to dena kuboolyut ilaka ke ap hamare hath de karas—(b.) from Bhaya Kishen Dutt to Thakoorain Sookhraj Koer dated Poos Sudi 10, 1266 F. This letter is to the same effect with the preceding. The same phrases occur e. g. " *Dena "hakimi hamare shamilat kuboolyut men diya karen &c, &c*" The Bhaya mentioned as a reason why the Thakoorain should allow the villages to remain in his kuboolyut, the custom of the English courts of justice to summon the parties in person, which custom would be inconvenient to the Thakoorain, a *pardah-nashin.* The letter ends in the following terms "*jaisa lambar shamilat illaka yahan ke nam se "hone den kuch rakhna andazi na karen apne illaka par ap "kabz dakhl barabar rakhen dena sirkar ke den nafa nuksan "taaluk ap ka nam ziyadah talab na karen.*"

These letters, if genuine, are very strong proofs of the justice of the respondent's claim. The court sees no reason to doubt their genuineness, nor was their genuineness impugned before the lower court.

Both Raja Kishen Dutt Panday, talookdar of Singha Chunda, a man of very great respectability and of high position, and thoroughly well acquainted with the circumstances of the Bhinga and Deotaha families, for whom he has stood security in the days of the *nawabi,* and Rai Sadhan Lal who was Nazim of Gonda and Baraitch at annexation, now residing at Colonelgunj, zilla Baraich, state that the Deotaha estate was given by Juggut Singh, to Kali Pershad, whom he had adopted: that in 1244 F. when Raja Durshun Singh was Nazim, Kali Pershad put his estate in the Binga kuboolyut to escape the exactions of the Nazim, and that he only paid the Government revenue to the talookdar of Bhinga.

The court refers to the proceedings of the lower court for the detail of the other documentary proofs produced by the parties to the suit.

The lower court decreed the Thakoorain's claim. The loyal grantee (Baboo Surubjeet Singh) appeals.

The *first* plea is incorrect. The respondent did remonstrate against the confiscation of her property as part of the Bhinga estate. She could get no redress. No enquiry whatever was made into her claim as preferred in her petitions of the 29th August, 9th October, and 12th October 1859, while her appeal to the Commissioner was rejected in an equally summary manner.

With regard to the *second* plea the Commissioner would observe that the village papers filed by the respondent have been carefully exammined by the sudder-canoongoes of both Gonda and Fyzabad in this court. They made a *mouzawar* list of the Deotaha villages from the *thathars* and *wasilbakees* of 1256 F. and verified the same by the *siahas* and *wasilbakees* of 1254. 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263 F; they also reported that the accounts were all old and correct.

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It is true, that in the list of villages of the Deotaha talooka sent up by the tehsildar of Gonda in 1859 A. D. (summary settlement), which list though not signed must have been supplied by the canoongoe (or at least the materials must have been supplied by him) the Deotaha villages are put down as being the "*asl zemindari*" of the talookdar of Bhinga, and as having been always in his possession (*dakhl wa kubza.*) This is said of all the villages in the list. The list was made out by the tehsildar from information supplied by the pergunnah canoongoe. The sudder-canoongoe's evidence is in respondent's favor.

On 27th May 1860 the pergunnah canoongoe alluded to mouza Asoghpoor as being held by Thakoorain Sookhraj Koer, widow of Bhaya Kali Pershad Singh deceased malgoozar of Asoghpoor, talooka Deotaha. This phrase confirms the respondent's assertion that though the Deotaha villages were included in the Bhinga talooka, the Government revenue was paid by her husband, and afterwards by herself, through the Bhinga talookdar.

There is no reason to believe that the respondent has been guilty of collusion with the Bhinga family, very shortly after she learned that the Deotaha villages had been confiscated as part of the Bhinga property, she remonstrated and her remonstrances were consigned to the record office without even an attempt at any enquiry. It is true that it would be for the benefit of the Bhinga family if her claim had been decreed, for then a moiety of only the Bhinga estate proper would have been confiscated, in place of a moiety of both the Bhinga and Deotaha estates; the present Bhinga talookdar being, moreover, the respondent's heir-at-law.

In the case referred to in plea 5, Bujrung Bullee, *plaintiff*, did assert that Bhaya Kishen Dutt (of Bhinga) gave him so many beeghas of land, while Lutchmun Pershad, the putwari's father, swore on his son's head that "when in 1251 F. Bhaya Kishen Dutt, talookdar of Bhinga got the village &c. &c." These statements are certainly favorable to the appellant. On the other hand it may be argued that the talookdar of Bhinga held the kuboolyut in which Asoghpore was included, and that therefore he was mentioned as the party who made the arrangement with the claimant.

Thakoor Pershad, who was the putwari of Asoghpoor previous to 1259 F., deposed that he was servant to Bhaya Juggut Singh and then to Bhaya Kali Pershad, that the only orders attended to were those of Bhaya Juggut Singh and Bhaya Kali Pershad.

The Commissioner has submitted the village papers filed by the respondent to a second careful scrutiny by the sudder-canoongoe of Fyzabad, whose services were kindly lent to the Commissioner by the Settlement Officer of Fyzabad. He reports that the *siahas* and the *wasilbakees* the first for 1254-5-6-7-8-9 F. and the second for 1260-1-2-3 F.) have every appearance of being genuine papers, that the

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siahas are all headed as follows "siaha amadani kharch talooka Deotaha *Sirkar Sri Mahraj Kumar Srt Bhaya Sahib Sri Bhaya Kali Pershad Singh jee.*"

The *wasilbakees* are similarly headed. In the *wasilbaki* for 1261 F. the words occur in addition to those words given above :—

"Tehsil Paik Ali, zilladar" and "Tehsil hakimi." The *siahas* and *wasilbakees* are for all the 43 villages which are said to form the Deotaha, or Deorena talooka.

Plea 6. The appellant pleads that the genuineness of the puttas which he filed (but which I am unable to find among the papers sent up to this court) may be tested by an examination of the mohurrirs who wrote them, and of the cultivators to whom they were granted. The Deputy Commissioner has rejected them as they bear no signature. The appellant's agent states that the Hindi papers, he gave in, formed a *busta* of themselves. The serishtadar states that the only Hindi papers sent up were those which the respondent filed and which have been examined by the Fyzabad sudder-canoongoe.

Plea 7. The court finds that the appellant presented, what Deputy Commissioner styles, "a lot" of village accounts before the Deputy Commissioner, and stated they were given to him by the old putwari Lutchmun Pershad; that Lutchmun Pershad's deposition was taken; that Lutchmun Pershad deposed that he knew nothing of the papers, that he never wrote them. The Deputy Commissioner then adds "N. B. this refers to the 5 Hindi chits filed by Salar Buksh alleged to have been obtained from the putwari." What about the "lot" of village papers filed by the appellant? These papers ought to have been examined, and the putwari's deposition recorded regarding them.

The Deputy Commissioner is requested to call on the appellant to produce those village accounts, and also to take the putwari's (Lutchmun Pershad's) deposition regarding them.

The Deputy Commissioner is further requested to send for the cultivators in whose names the puttas are given, should they (the cultivators) be forthcoming, and ascertain from whom they held, and to whom they paid rent.

H. S. REID,

22nd August 1866. *Commissioner.*

The proceedings were remanded to the Deputy Commissioner of Gonda, to give the appellant, the opportunity of producing the village accounts on which he relies, and in order that the putwari's deposition regarding them might be recorded, also that it might be ascertained from the cultivators, who held the puttas filed by the appellant, by what party the puttas were granted.

The appellant's witnesses, the *hulwars* and cultivators, supported his story, but the lower court was inclined to place but little reliance on their testimony, as their depositions

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were not supported by any trustworthy documentary evidence, the letters filed by appellant not bearing Raja Kishen Dutt's seal or signature, nor yet the seal or signature of any one acting for him.

Thakoor Pershad, who had to make the collections in the village, was examined on solemn affirmation. He alleged that he collected on account of the respondent. He produced a bundle of papers which in the opinion of the lower court bore every appearance of genuineness and which tally with the accounts produced by the respondent a year and a half ago. This witness denied that the documents filed by appellant and bearing his (witness's) signature were written by him. He objected to some of them as written on paper artificially discolored, while the *ink* was, he asserted, evidently fresh.

Three canoongoes deposed to the village having formed part of the Deotaha (respondent's) talooka, so did Sheochurn, a lessee of mouza Saryan under the appellant.

The Deputy Commissioner records that he sees no valid grounds for altering his opinion originally expressed with regard to the settlement of the village with the respondent.

After a careful consideration of the arguments urged and evidence produced by both parties, I am compelled to arrive at the same conclusion with the lower court. I believe mouza Asoghpoor to have been one of the villages which belonged to the respondent, as widow of Bhaya Kali Pershad. The connection between Bhaya Kali Pershad and the Bhinga family, of which he indeed may be said to have been a member, was doubtless most intimate. It appears that he resided at Bhinga. The fact of the rents collected in the Deotaha villages being sent to Bhinga is no proof that *the rents* were remitted to the raja of Bhinga. The objections by the appellant have been answered by the lower court in its judgment of the 18th December last.

The order of the lower court is affirmed and appeal dismissed.

H. S. REID,
Commissioner.

JUDGMENT OF THE FINANCIAL COMMISSIONER.

The Financial Commissioner is of opinion that plea 3, viz. that the summary settlement of 1858-59 having been made with the raja of Bhinga, the decrees of the lower courts awarding the full proprietary rights to Thakoorain Sookhraj Koer militate against the Government orders of the 10th October 1859, must be held to be good. The raja under those orders became the full proprietor, and any rights formerly enjoyed by his relations were thereby annulled. Therefore, even if it were clearly proved, as held by the lower courts, that the Thakoorain was the true proprietor up to the summary settlement, and that she afterwards continued in possession of her rights without disturbance by the raja, still,

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as her title (if she had one) was transferred to the raja, she cannot now plead it successfully.

But although the courts decreed full proprietary right to her, her original claim was to sub-settlement as under-proprietor. It remains to decide whether this can be maintained.

It is to be observed that the villages in dispute were not conferred on the raja by sanad, for they were confiscated before a sanad had been issued owing to the raja's concealment of cannon. The Thakoorain therefore can only claim the benefit of any orders given in her favour in the letter of the 10th October 1859. But the letter unfortunately contains no clause in favour of any parties except "inferior zemindars and village occupants" amongst whom the Thakoorain cannot be classed. Furthermore her claim to sub-settlement is barred also by the interpretation given in para. 7 of the Chief Commissioner's Minute on Act XXVI of 1866 which identifies "under proprietary rights" with the right of a person who was in possession of the proprietary right at the time the village was incorporated in the talooka: under this definition no relative of a talookdar, however long he may have held full apparent hereditary and proprietary possession of a mehal within a talooka, can obtain a sub-settlement, unless it can be shewn that the mehal in question has been held at some interval under distinct revenue engagements with the native Government.

DECREE.

The orders of the lower courts are reversed, and the claim of Thakoorain Sookhraj Koer to both proprietary rights and sub-settlement of Mouza Asoghpoor, Illaka Deotaha, is dismissed.

R. H. DAVIES,

Financial Commissioner, Oudh.

(*Finl. Commr's. Cir. No.* 109, *dated 9th December* 1867.)

Nirput Singh, Appellant, versus Deo Singh, Respondent.

CLAIM.—Proprietary right in Illaka Mehsooee, Pergunna Karouna in the district of Seetapore.

A mortgagee who has been dispossessed can sue within 12 years to recover possession of the land mortgaged.

It appears to the Financial Commissioner that the lower courts are agreed that the special-appellant (Nirput) has a good title under his mortgage deed. It further appears that there can be no doubt but that he is entitled to the presumption that whatever possession he held was in virtue of that title, nothing to the contrary being proved. It follows this as that possession was obtained within limitation the special appellant would get a decree for the restoration of the five villages claimed, and that the award of the money due to him will not meet the equity of the case. If, indeed, the money is to be awarded it should be in exact accordance with the terms of the deed.

There is some doubt however regarding the term of limitation within which restoration of possession under a

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mortagagè deed can be claimed, and as reference to the Advocate General has been made on this point, judgment is deferred.

R. H. DAVIES,

The 24th July. *Financial Commissioner, Oudh.*

The following question was put to the Advocate General :—

"What is the limit for suits preferred by mortgagees out of possession to recover possession ? three years as contract, or twelve years?"

The Advocate General replied :—

" The mortgagee has twelve years within which to recover possession from the mortgagor."

The Officiating Commissioner threw out the claim of the special appellant and awarded him only the money due on his mortgage bond, holding that he was barred by limitation. The Financial Commissioner concurs in the view of the law taken by the Advocate General.

DECREE.

The order of the lower appellate court is reversed. The proprietary rights in mouzas Gungapoor, Misrapoor, Bhugwuntpoor, Gobindpoor and Rampoor are decreed to Nirput Singh and his co-sharers as mortgagees.

R. H. DAVIES,

19th December 1867. *Financial Commissioner, Oudh.*

(Finl. Commr.'s Cir. No. 115, dated 24th December 1867.)

Golfut Rai, Plaintiff-Appellant, versus Debee Singh, Defendant-Respondent.

A suit to obtain possesion on a mortgage deed on which possession has not been had, is a suit for "a tenure," under Act XIII of 1866, and therefore cognizable by the Courts of Revenue, subject to the limitation laid down in Act XIII of 1866.

This is a claim founded on two deeds of mortgage. One is for Rs. 3,391-2-3 and concerns Mirchowree and three other villages: the other for Rs. 9,207 refers to Rajagaon and thirteen villages. The lower appellate court has found that the validity of the second deed has not been proved, and the Financial Commissioner accepts this finding on the facts. The second deed has been found to be valid, but the lower appellate court held that as possession had not been had on it, the special appellant's remedy lay only for damages in the civil court.

At the request of counsel the court took the opinion of the Advocate General who writes as follows: "Act XIII of 1866 is exceedingly obscure but I think the words "any tenure" must apply to all "suits of whatever description relating to the title or succession to land or to the possession of land or to any right in respect of land" as described in Section 2 of Act XVI of 1865. A suit by a mortgagee out of possession to gain possession, or a suit against a mortgagee in possession by some person claiming by title

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paramount would be suits within the section, and consequently within the first section of the Act of 1866. Such a suit under a paramount title might be either by a person who claimed by a better title than that of the mortgagor, or it might be by a first mortgagee against a second mortgagee in possession. I also think a suit by a mortgagee, whether in or out of possession, to foreclose would be a suit relating 'to a right in respect of land" and so within the section."

Concurring in this opinion, the Financial Commissioner modifies the decision of the lower appellate court.

DECREE.

The order of the lower appellate court is affirmed as respects Rajagaon and its 13 dependent mouzas; and reversed as respects Mirchowree and its three dependent mouzas the proprietary right in which is hereby decreed to Oolfut Rai and his co-sharers as mortgagees.

R. H. DAVIES,
Financial Commissioner, Oudh.

(Finl. Commr's. Cir. No. 116, *dated 24th December* 1867.)

Doolee Beebee, Plaintiff-Appellant, versus Shoojayet Khan, Defendent-Respondant.

Claim to 1 pie and 7 krant share in mouza Mawaee, pergunna Moulara, district Barabunkee.

The judgments of the Extra Assistant Commissioner and the Commissioner in the above case are circulated for information and guidance.

R. H. DAVIES,
5*th February* 1868. *Financial Commissioner, Oudh.*

Extra Assistant Commissioner's Judgment.

Held that it is not proved that there is any custom amongst the *Bhuttees* under which a childless widow inherits no share if there be a nephew.

Futteh Khan was the ancestor of both parties—he had two sons Kadir Khan and Ameer Khan. Doolee Beebee, plaintiff in the present case, is the wife of Ameer Khan. Shoojayet Khan, son of Kadir Khan, is defendant. Plaintiff claims as heir of Ameer Khan, half of what may be Futteh Khan's share in each village on the following grounds :—

That her husband died in 1265 Fuslee; up to that time khewut of both parties was in one, and both parties lived together, and all affairs were jointly carried on. In 1268 Fuslee, defendant turned her out of the house, and from this time the cause of quarrel and contention arose. Defendant lays 3 pleas :—

1. That Futteh Khan, the common ancestor, during his lifetime made Shoojayet Khan his successor and proprietor, and that Ameer Khan, plaintiff's husband, had no concern with the property.

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2. The plaintiff was a lunatic, therefore, after marriage, Ameer Khan paid the amount of her dower and divorced her.

3. Amongst the "*Bhuttees*" a childless widow obtains no share if there is a nephew.

Three issues are fixed for trial:—

1. Did Futteh Khan during his lifetime make defendant his successor and proprietor and put him in possession of all his property? If so, did Ameer Khan lose his rights or not?

2. Did plaintiff receive the amount of the dower during the lifetime of her husband, and, according to the provisions of the divorce, did she lose the rights of a wife, and the proprietary right of her husband? or is the divorce incorrect?

3. What is the prevailing custom amongst the "*Bhuttees.*" Does not a childless widow, in presence of a nephew, receive any share? or does she receive the whole of her share? If no custom be proved to the satisfaction of the court, then under what law should the court dispose of the case?

Regarding the first issue it appears by the evidence of witnesses that Futteh Khan, during his lifetime, made Kadir Khan, father of Shoojayet Khan defendant, the manager of his estate, and, when Kadir Khan died, the same duty was entrusted to defendant.

The court considers that by this act of Futteh Khan, his second son Ameer Khan cannot be deprived of his right and share. Ameer Khan during his lifetime lived in the same house with them and jointly enjoyed the profits of the estate.—Amongst the natives in general it is the custom that the management of the estate and all other zemindari affairs are entrusted to the most competent member of the family, and, by his acting as a manager, the rights of other members of the family are not lost but continue to exist.

The second issue is an important one and until the divorce has been legally proved it cannot be admitted by the court. The onus of proof that plaintiff was really divorced rested on defendant; he produced two witnesses who depose that they heard from Ameer Khan, plaintiff's husband, that he had divorced plaintiff. Amanut Ali, father-in-law of defendant, is one of the two witnesses, who will do his best to protect his son-in-law from suffering any loss, therefore his evidence cannot be relied on. Rejecting his evidence, there only remains one witness, and the evidence of one witness is not sufficient to establish such an important point.

Regarding the third issue the witnesses of each party confirm the statements of the party for whom they appear.

In the case of Talayar Khan, plaintiff *versus* Sehut Beebee defendant, which is identical with the present case, the question whether a childless widow does inherit her husband's property, or whether the males of the family are

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entitled to the whole share, and the widow only to maintenance, was fully tried, but no special custom was proved to prevail, and therefore the case was disposed of under the Mahomedan law.

In the present case as no special custom is proved to prevail in this family this case is also referred to the Mahomedan law, under which a widow, when the nephew of her husband exists, is entitled to an eighth share which can be decreed in her favor; but several persons surround her, whose object is the destruction of the property; therefore, to save the proprietary right which has existed for a long time in this family, it seems advisable that plaintiff be not authorized to transfer the property to a third party. Under special necessity she may transfer her share to defendant at the bona-fide price actually offered by other parties.

DECREE.

Three krants, two jows and one til, being a one-eighth share out of 1 pie 7 krants is decreed in favor of plaintiff, and the remainder of her claim is dismissed.

COMMISSIONER'S JUDGMENT.

Futteh Khan had sons—from Kadir Khan is the respondent,—appellant is widow of Ameer Khan.

The Extra Assistant Commissioner fixed issues:—

1. Did Futteh Khan adopt respondent and make over to him the estate during his lifetime? Would that destroy the right of Ameer Khan? *Found*—Futteh Khan did, but the right of Ameer Khan not affected.

2. Was appellant divorced or not? If divorced, does she lose a right to her husband's estate? *Found*—not proved.

3. By *Bhuttee* custom when the brother's son is alive does the widow take a share? and if so what?

In the case of Talayar Khan *versus,* Sehut Beebee enquiry as to custom of *Bhuttees* was carefully made: as to succession of widow no custom was proved, therfore, that was decided on Mahomedan law.

The law gives the widow one-eighth.

I find that Sehut Beebee's case was appealed to the Settlement Officer who reversed the Extra Assistant Commissioner's order, the special appeal of Atta Oolah was heard in this court on 22nd May 1867, and the case was sent back as the lower court had not decided the case on its merits but on a point of law which, according to this court, was wrongly ruled.

The case of Sehut Beebee was, after remand, disposed of by the Settlement Officer on 14th June 1867. He concurred with the Extra Assistant Commissioner in finding that there is no sufficient proof as to any custom as to female inheritance among *Bhuttees*, and that, therefore, the succession must be guided by Moosulmán law.

This case has been decided by Mahomedan law. Appellant urges the custom and the precedents in his petition. Respondent says taht in none of those cases is there a judi-

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cial order, nor is there a nephew alive aswell as the widow, nor has the heir male objected. The fact of custom being found by the lower courts, who concur in saying that none is shown, and the two decisions being now based on Mahomedan law, the special appeal must be dismissed.

WILLIAM C. CAPPER,

15*th June* 1867, *Officiating Commissioner.*

(Fin. Commr.'s Selected Cases I *of* 1868 *)*

Lalta Sing, Plaintiff-Appellant, versus Jham Singh, Defendant-Respondent.

Lalta Singh, Plaintiff-Appellant, *versus* Jham Sing, Defendant-Respondent, Claim to possession of 3 *Baghs* in mouza Behsur pergunna Sundeela, district Hurdui.

Held that according to the law of the Western Schools *(Mitacshara)* a widow cannot alienate any moveable property which she has inherited from her husbad, whether ancestral or acquired; and that on her death it will pass to the next heirs of her husband; and this, although the husband may have been a member of a divided family.

The Financial Commissioner publishes for general information, copies of the judgment, in the case marginally noted, of the Officiating Commissioner of the Seetapore Division, (with whom the Financial Commissioner concurred) and of the order of the Lords of the Judicial Committee of the Privy Council, referred to by the Officiating Commissioner.

L. BARROW,

Offg. Financial Commissioner, Oudh.

12*th March* 1868.

JUDGMENT OF THE OFFG. COMMR. SEETAPORE DIVISION.

On the 20th November 1860, Lalta Singh claimed, as the heir of his "*dadee*" Mussumat Kooslee, a two anna share in mouza Behsur, against Jham Singh, daughter's son of Kooslee, alleging that the *hibanama* filed by Jham Singh was informal and invalid. Jham Singh replied that he was the Thakoorain's grandson, female side, and had been brought up by her since he was 3 years old, and had managed for her, that he did not claim as heir, but on a *hibanama* executed by the Thakoorain in his favor on the 27th December 1859, and in 1264 Fuslee his name was entered in the deed of mortgage.

It may be assumed that Jham Singh was not adopted by Mussumat Kooslee. The evidence regarding the adoption is of a general nature. Jham Singh himself in 1860, deposed that he did not claim as Kooslee's heir but on the deed of gift, and if he had been adopted, the deed of gift would have been quite superfluous. The Settlement Officer is of opinion that Wuzeer Hoosein summed up wrongly, and that the deed of gift is genuine, and the court agrees with him so far, but it does not agree with him that the casual remark of one of the witnesses proves that the gift, if made, would be valid. By Hindoo law a Hindoo widow has no power to transfer real property inherited from her husband: this has been repeatedly laid down by the Sudder Court North Western Provinces, and, very recently a decision * based on this principle has been affirmed by the Privy Council.

* NOTE.— Mussumat Thakoor Deyhee, *versus* Rai Baluck Ram and others delivered 1st February 1867, (copy annexed.)

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The issue a very important one, viz: the power of the widow to make a valid transfer has never been fixed, much less tried. The case is therefore remanded to give Jhum Singh an opportunity of bringing forward precedents in this village or adjoining villages held by the same Thakoors to prove that, in opposition to Hindoo law, there is a well defined local custom that widows have a transferable interest in land inherited from their husbands.

J. R. REID,
Officiating Commissioner.

28th March 1867.

Vide memo: of 28th March and Officiating Settlement Officer's additional enquiry ending 4th instant.

The Hindoo law being quite clear on the subject and respondent having failed to quote a precedent in this village, or in adjoining villages held by the same Thakoors to prove that widows have power to alienate the landed property of their deceased husbands, the court must reverse the Settlement Officer's order, and decree in favor of appellant on the understanding that he is the nearest heir, male side, of the widow's husband.

J. R. REID,
Officiating Commissioner.

7th June 1867.

Judgment of the Lords of the Judicial Committee of the Privy Council on the appeal of Mussumat Thakoor Deyhee, versus Rai Baluk Ram and others from the late Sudder Dewani Adalut at Agra, North Western Provinces of Bengal delivered 1st February 1867.

SIR JAMES W. CLOVILE.
SIR EDWARD VAUGHAN WILLIAMS.
LORD JUSTICE CAIRNS.
SIR RICHARD T. KINDERSLEY.

SIR LAWRENCE PEEL.

The question on this appeal is the right of succession to certain property of which one Choteh Beebee, a Hindoo widow, died possessed. She was the widow of one Ramjee, who died in 1824 without issue; and he was the only son and heir of Benee Ram, one of the five sons of Rai Suhuj Ram. The respondents are all decended from the last named ancestor through one or other of his four other sons, and are admitted to be the collateral male heirs of Ramjee living at the date of his widow's death. The appellant is the

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niece of Choteh Beebee, her brother's daughter. She is said to have been from her infancy adopted by her aunt, and treated as a daughter. But the word "adopted" must here be taken in its popular, and not in its technical, sense. It is not now contended that the adoption was of that kind which, according to Hindoo law, would create between Choteh Beebee and the appellant the relation of parent and child for all religious and legal purposes, or give to the latter any right of inheritance. The question in this case is, whether the property in dispute, on the death of Choteh Beebee, descended to the respondents as the collateral heirs of her husband then living, or passed, under a deed of gift alleged to have been executed by her shortly before her death, to the appellant. That property is partly movable, and partly immovable. The latter is situated in the districts of Tirhoot, Behar, Shahabad, and Benares, and the deceased was domiciled at Benares. Therefore the law by which the succession to the whole is governed is that of the Western schools. The issues recorded in the cause were, whether Mussumat Choteh Beebee was competent to bestow the property in gift or not; and if she was, whether the deed of gift relied upon by the defendant (now the appellant) is valid or not. This appears at page 7 of the record. Between the date, however, at which the issues were recorded and that of the trial, a change took place in the constitution of the court of the Principal Sudder Ameen of Benares, in which the cause was pending; and Mr. Smith, by whom it was tried, in his judgment, at page 77, says—

"The disposal of the case rests on two important issues:—

1st.—Whether the property which was the subject of the gift to the defendant was joint ancestral or not.

2nd.—Whether the alleged deed of gift is or is not a *bona fide* instrument."

The first of these questions, as will hereafter be shown, is by no means identical with the first recorded issue. Mr. Smith, however, having decided it in favor of the appellant, appears to have considered that the necessary consequence from his finding was, that Choteh Beebee was legally competent to alien the property; and further found that she had duly executed the deed of gift. He therefore dismissed the respondent's suit with costs. There was an appeal to the Sudder Court of Agra, and that Court, confined its attention to the second of the recorded issues, and after taking further evidence as to the *factum* of the alleged deed of gift, came to the conclusion that the instrument was forged, and on that ground alone made a decree in favor of the respondents. The present appeal is against that decree.

Their Lordships, reverting to the recorded issues, will consider them in their inverse order. They will first consider whether the evidence in the cause can be taken to have

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established that the alleged deed of gift was duly executed by Choteh Beebee.

The case set up by the appellant is the following:—In 1858 Choteh Beebee undertook a pilgrimage to Juggernath. She was accompanied by the appellant's brother Balkishen, Nathoo Ram a priest, and Bunsee a menial servant. On her return homewards from the shrine, and a few days before she reached Midnapore, she was attacked with dysentery, and arrived at Midnapore very ill, and despairing of recovery. The instrument itself expresses that she had no hope of getting home alive. It was prepared by Hurree Doss a pleader in the Judge's court of Midnapore, and by his nephew and clerk Deenbundhoo Muttye. It was written in Bengalee, a language foreign to the person by whom it purported to be executed—a language which it is admitted she did not understand. It was executed at the door of the cutcherry of the Registrar of Deeds, to which place both Choteh Beebee and the appellant were taken in separate palanquins, and there registered. The appellant (record *p*: 23) says,—"After the registry was effected we returned home, and left the station." Balkishen says that Choteh Beebee remained at Midnapore about two days after the deed was executed and registered. All the witnesses who speak to the fact seem to agree that she died about thirteen or fourteen days after the execution of the deed, at a place called Gobind Chuttee distant about seven days' march from Midnapore, and that her body was there burned.

We have now to consider the evidence given to prove this transaction more minutely, and first it may be well to see what evidence there really is that the person who put her hand to the instrument was Choteh Beebee.

The subscribing witnesses to it are Balkishen, *Nathoo* Ram, Bunsee, and four Bengalees *viz.*, Tarachund Muduk, Modhoo, a chowkeedar Sree Chedum Surma or Sirdar, and Deenbundhoo who was concerned in the preparation of the deed. The first three of the Bengalee witnesses may be at once disposed of. Neither their subscriptions nor the testimony of such as have been examined can add anything to the credibility of the transaction. Tarachund almost admits that he was called out of the crowd about the door of the cutcherry to become a subscribing witness, without previous knowledge of the parties or of the transaction. He says (*p*: 87) that Chedum Surma, elsewhere called Chedum Sirdar and Modhoo, the watchman, were unable to write, and he does not know who signed for them; whilst Balkishen (at *p*: 69) says—"Those witnesses who could write signed for themselves; and those who could not, Deenbundhoo signed for them." Chedum Sirdar does not seem to have been examined, and Modhoo was probably a witness of the same class with Tarachund, for his statement that he, a village watchman, had been admitted into the presence of Choteh Beebee, or had been requested by her to sign the deed, is utterly incredible. Besides the evidence of the subscribing

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witnesses, we have that of Hurree Doss, and Shamchund Ghose, who took upon themselves to identify Choteh Beebee to the Registrar. But it is obvious that they could only speak to her identity from information derived from those who travelled in her company; or from the person spoken of as the Chowbey. He was the only resident in Midnapore who it is pretended had ever seen or known Choteh Beebee before this transaction. He was a *Pundah*, a sort of priest, who had migrated to Midnapore from the upper provinces, and there dealt in sweetmeats. His name is not given, and he appears to have been known only as the "*Chowbey-Hulwai*," an appellation which expresses both his *status* as Brahmin and his occupation as confectioner. What was the extent of his previous acquaintance with Choteh Beebee does not appear. Balkishen (*p*: 69) says—"She knew a Chowbey of Muttra at Midnapore. On going to Juggernath she saw the Chowbey, who kept a shop, but did not halt at Midnapore; she halted further on." But whatever was the extent of his acquaintance, the Chowbey neither attested the deed nor appeared before the Registrar to identify her, nor gave evidence in the cause. When the examination of the additional witnesses took place at the instance of the Sudder Court, he had disappeared from Midnapore, and could not be traced. There is, therefore, no evidence of the identity of the person who signed the deed with Choteh Beebee, except that of the appellant, her brother, their dependent, the priest, and a servant. This might have been corroborated by satisfactory evidence of the handwriting; but from the evidence on that point and a comparison of the Nagree signature on the deed with the admitted signature of Choteh Beebee upon other documents, the Sudder Court has come to the conclusion that the former is a forgery. The testimony, too, of the *Kobiraj*, or native doctor, if forthcoming, might have afforded some slight corroboration of the story. He could at least have proved that he was called in to attend a woman, dangerously ill of dysentery, and have shown in what state of body or mind his patient was.

Again, there is no evidence, except that of the four persons abovementioned, of the time and place of Choteh Beebee's death. Their testimony on that point might have been corroborated by that of the police authorities of the station where she is said to have died; but that corroboration is wanting.

We will next consider the evidence touching the preparation and execution of the deed. It seems clear that Hurree Doss, the pleader, was called in on the night of the arrival of the party at Midnapore. He is the person called Sreedhur Moonshee by the Hindustanee witnesses. There is a good deal of discrepancy in the evidence as to the manner of calling him in. He himself says that Balkishen and Nathoo Ram called on him, and said he had been recommended to them by the Chowbey. Shamchunder Doss

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who seems to have been hanging about the house where the pilgrims put up, professes to have directed them to Hurree Doss. Bunsee says—"The Chowbey sent for Sreedhur Moonshee." Nathoo Ram's evidence is to the same effect, and Balkishen says that he "and the Chowbey went to Sreedhur Moonshee who sent for the writer" (Deenbundhoo.) These discrepancies, however, are not of much importance. It is clear that Hurree Doss went to the house where the woman alleged to be Choteh Beebee was, on the night of her arrival; and though the evidence is not altogether consistent on that point, that he took Deenbundhoo with him.

Hurree Doss being the professional person responsible for the preparation of the document, it is to his evidence that we naturally look for a true account of that part of the transaction. His statement is to this effect:—"I found Choteh Beebee lying down. She said—'Are you a Vakeel?' I said 'I am.' She said—'All my property I wish to make over in gift to Thakoor Deyhee, my niece,'—who was then sitting by her. I asked what estate *(talooka,)* and what property, that a rough copy might be prepared. She said.—To night I am not at all well but to morrow morning I will have it all written out.' I then returned that night to my house. The next morning I sent Deenbundhoo to take a list, and ascertain what she wanted to have written. He went and took down all particulars. I said the whole of the property was to be made over, and that she had no stamp paper. I then drew out a deed of gift in the Bengalee language, and I sent Deenbundhoo with it to Choteh Beebee, to be read to her, and ascertain whether it was what she wanted. Deenbundhoo returned, and said she had agreed to what I wrote. The next day I had it all clearly written out on stamp paper, and brought it to the cutcherry. Choteh Beebee and Thakoor Deyhee also came in palkees to the court and I then read out to Choteh Beebee the contents of the *hibanama*, and she signed it with her own hand. Choteh Beebee was then taken in a palkee before the Registrar; the door of the palkee was opened and the Nazir questioned her by the Principal Sudder Ameen's orders, and she admitted that she had executed the deed. I received back the *hibanama* after registry, and the next day took it to Thakoor Deyhee, through Balkishen."

From this statement it is to be inferred that on the first evening nothing was expressed, but a general intention to make a gift of the whole property; that on the following morning the pleader obtained more particular instructions through Deenbundhoo; that he then, in his own house and with his own hand, drew up the draft deed and sent it by Deenbundhoo to be explained to the woman; that on the following day he had the engrossment made on stamp paper, in his own house, and took it thence to the court-house, where he met the two women in their palkees; that he

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read over the fair copy to the woman said to be Choteh Beebee outside the court, who executed it there; that she was then taken in her palkee before the Registrar, and to him or his Nazir acknowledged her signature. One would have expected that this account would have been confirmed at least by the clerk, Deenbundhoo, in all its material particulars. This, however, is not the case. His statement is that on the night when, according to Hurree Doss, Choteh Beebee was too ill to give full instructions, he remained behind and took down from her dictation what he calls a list containing the names of her husband and her father; that the rough copy of the deed was drawn out the next day, and was clearly written out and taken to her by him. In another part of his evidence he says that Hurree Doss prepared the rough copy of the deed in her house; that Choteh Beebee explained to him what she wanted done, and that he (the witness,) at Choteh Beebee's request, wrote the copy out clearly on paper. (This probably means the copy on stamp paper.) He says that on the same day (being the day after the evening on which Hurree Doss was first called in,) the two women came to the cutcherry, and that the deed was then and there executed and registered. He does not state how, or by whom, the Bengalee instrument was explained to her. The testimony of the Hindoostanee witnesses, on the whole, tends to confirm the statement of Deenbundhoo rather than that of Hurree Doss. Both Nathoo Ram and Balkishen say that both the draft and the fair copy of the deed were written and explained by Deenbundhoo at Choteh Beebee's house. They do not speak to the fair copy having been explained to her by Hurree Doss at the cutcherry when it was executed. They say that the deed was written and executed on the same day,—viz. that following the evening of Choteh Beebee's arrival at Midnapore. Bunsee, however, states that the fair copy on stamp paper was written at the cutcherry, and that the deed was written after remaining three days at Midnapore.

Here, then, their Lordships have to deal with an instrument avowedly taken *ex capite lecte* from a woman stricken with a mortal disease, and in expectation of death; that woman being one of a class which the law regards as in need of especial protection. Whatever strictness is required in the proof of a testamentary disposition is at least equally required here. The document is written in a character and language, which, if in the fullest possession of her faculties, she could neither read nor understand. The accounts given by the witnesses of its preparation and explanation are inconsistent and unsatisfactory. If it were even established that the person who put her hand to the paper was Choteh Beebee, the proof would still fall short of that which ought to be given to support such a transaction—proof that she really knew what she was about, and intended to make this disposition of her property.

Again, the circumstances of the execution are, in their Lordships' judgment, extremely suspicious. This sick and

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almost dying woman is said to have been carried down on the afternoon of an August day, and deposited at the door of the cutcherry. Whilst lying there she has the instrument explained to her for the first time, by the person chiefly responsible for its preparation, through the half-opened doors of her palanquin. She executes it, and some of the witnesses of her act are picked up then and there out of the crowd. One witness says that the deed itself was fairly copied at this time and place; several, and that is far more credible, that an additional copy for registration was then made. After all this ceremony is gone through, she is carried into court and questioned by the Nazir.

Now she might certainly have executed the deed in the privacy of her own house, nor does she seem to have been bound, by the acts and regulations touching registration, to appear personally before the Registrar in order to have it registered. She might have sent it for that purpose by a duly authorised representative with one or more of the witnesses, who could speak to her execution of it.

Appearance in a public court, even under the protection of a palanquin, is a thing repugnant to the feelings and habits of a Hindoo woman of Choteh Beebee's position, even when she is in perfect health. The same feeling might not operate on one who personated her, or on one who sought to profit by the fraud. And the extraordinary publicity resorted to on this occasion seems more likely to have been designed to give a color to a false transaction than to have been an incident in a regular one.

Considering, then, the whole evidence and the startling improbabilities of the case set up, their Lordships are of opinion that the appellant has failed to establish the validity of the deed of gift on which she relies. It is not necessary to say that on this evidence she and her witnesses must be taken to have been guilty of conspiracy, perjury and forgery. It is sufficient to say that the proof falls very far short of what is required to support the affirmative of the issue which she was bound to prove.

If the appellant were suing to recover possession of the property from the respondents by virtue of the deed of gift, the conclusion to which their Lordships have come would of course determine the cause. That, however, is not the nature of the suit, and the respondents, being the plaintiffs below, have to show a title to the relief which they claim. The object of their suit, as stated in the plaint, was to be confirmed in the possession of the various parcels of immovable property which are therein specified; to recover certain movable property which seems to have been under attachment; to have the deed of gift cancelled and set aside, and to avoid the title which the appellant was then understood to claim by virtue of adoption. The first things to be determined are, the status of the family and the nature of the property.

The respondents alleged in their plaint that the family of the common ancestor Suhuj Ram, including Benee Ram

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and Ramjee, had continued to be undivided. But the evidence, and above all the indisputable fact that Choteh Beebee was in possession of the greater part of the property in dispute as heiress of her husband for upwards of thirty years, seem to their Lordships to support the finding of the Principal Sudder Ameen,— that Ramjee was not a member of an undivided family, of which the respondents, whatever be their status *inter se*, are, or represent, the other coparceners ; Benee Ram having separated from his co-heirs and taken as his share of the ancestral estate the villages in Tirhoot which form the first parcel of the immovable property that is the subject of this suit. Their Lordships also accept as true the history which has been given by the learned counsel for the appellant of the acquisition of the other parcels of immovable property.

The state of the family and the nature of the property having been thus ascertained, the only question is, whether the respondents became entitled to the possession of it on the death of Choteh Beebee as the next heirs of her husband. The appellant's supposed title by adoption has been abandoned, and the validity of the deed of gift has already been disposed of. It is difficult, however, to deal with the remaining question without adverting to the arguments, which have been addressed to their Lordships in support of Choteh Beebee's power to dispose of the property, since the right of the husband's collateral heirs depends in some degree on the nature of the widow's estate.

The learned counsel for the appellant, whilst they admitted that, by the law as it prevails in Lower Bengal, the estate of inheritance which a Hindoo widow takes in the property of her husband dying without male issue, is limited in its enjoyment ; that she cannot alien such property, whether movable or immovable, except for certain defined purposes, and subject to certain restrictions ; and that it passes on her death to those who are then the next heirs of her husband—have, nevertheless, contended that this is not the law of the Western schools, and have attempted to show that at Benares and in the other Provinces governed by the *Mitacshara*, the widow's estate in her husband's property is absolute ; that she has full power to dispose of it ; and that if she fails to do so, it is, after her death, subject to a different course of succession from that which obtains in Bengal.

The opinion of the Pundit taken by the Sudder Court, and set forth at page 91 of the appendix, does not support this contention in its integrity. He admits the right of the widow to alien movable property, whether ancestral or not, and the immovable property acquired by her husband or herself, with the proceeds of the former's share in the ancestral estate ; but he denies her right to dispose of her husband's share in immovable ancestral property, and states that on her death it devolves on her husband's next of kin. He does not show that, if she does not exercise her alleged power of

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disposition over property of the two other classes, that does not also pass on her death to her husband's heirs.

The learned counsel for the appellant relied mainly on arguments drawn from the 1st and the 11th sections of the 2nd chapter of the *Mitacsharas ;* and on the supposed confirmation of them by Sir Thomas Strange. The first of these sections deals with the right of the widow to inherit the estate of one who leaves no male issue. It states the various conflicting authorities on the subject, some favorable, others adverse, to the widow's right; it weighs and contrasts them, and comes ultimately to the conclusion embodied in the 39th article, viz:—

" Therefore it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man who, being separated from his co-heirs, and not subsequently re-united with them, dies without male issue." It need hardly be observed that the rule thus stated merely affirms the widow's right of succession, with a qualification unknown to the law of Bengal, viz : that her husband was not at the time of his death a member of an undivided family. The text is wholly silent as to the disabilities of the woman, or the nature of the interest which she takes in her husband's estate. It may also be conceded that nothing on these points is to be found in the rest of that portion of the *Mitacshara* which has been translated by Mr. Colebrooke, and published under the title of " The Law of Inheritance from the *Mitacshara.*" It is not, however, a necessary consequence from these circumtances that the Benares school recognizes in the widow an absolute power of disposition over the estate which she has inherited from her husband, or her absolute interest therein. We have not the whole *Mitacshara.* Mr. Colebrooke, in his preface, page iv states that his work includes *only* an extract from that celebrated treatise, comprising so much of it as relates to inheritance. The widow's disabilities, which depend in a great measure upon the notions which the Hindoo legislators entertained of the infirmity and necessary dependence of the sex, may be dealt with in other parts of the work. It is certain that upon other subjects the *Mitacshara* cities with approbation Menu, Catayana, Nareda, and others, upon whose diets the limitation of the widow's enjoyment of her husband's estate, and of her power over it, chiefly depends; and that these authorities are received by the Western schools as well as by that of Bengal. Accordingly Sir Thomas Strange (vol : I. p. 246) states clearly that such limitations are, with some slight variations, common to all the schools.

A more plausible argument in favor of the appellant's contention may be derived from the eleventh section of the 2nd chapter of the *Mitacshara,* if the words " also property which she may have acquired by inheritance," which occur in the 2nd article of this section, are taken (as they are taken by Sir Thomas Strange and others) to include property inherited from a husband. For it may be said that there can be

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no distinction between different portions of a woman's *stridhun*, or separate property: if she can dispose of part of it, she may dispose of the whole ; and further, that the whole must pass on her death according to the law which regulates the succession to *stridhun*, Sir William McNaghten, however, in his "Principles and Precedents of Hindoo Law" vol; I, p. 38, lays down broadly that there is such a distinction. He says, " In the *Mitacshara*, whatever a woman may have acquired, whether by inheritance, purchase, partition, or finding, is denominated woman's property, but it does not constitute her *peculium*." And he then proceeds to show what is that *peculium*, or *stridhun* proper, according to Menu.

Certain it is that, whilst no decided case has been cited in support of the appellant's contention, there are many to show that according to the Benares and other Western schools the power of a widow over property inherited from her husband is limited, and that on her death it passes to his heirs. The cause of Keerat Singh versus Koolahul Singh (2 Moore's 1 A, p: 331.) where the property in dispute was situated in the district of Benares, is directly in point. To the same effect are the cases at p. p. 32 and 189 of the second volume of McNaghten's "Principles and Precedents." Several of the cases set forth in the appendix to the 10th chapter of Sir Thomas Strange's work, with the remarks of Mr. Colebrooke and others thereon, also support this view. (See 2 Strange, p. p. 402, 407, 408, 439.) The " Vivada Chintamani " which has been recently translated by Baboo Prosunno Coomar Tagore, and is of high authority in the Mithila school, and in the district of Tirhoot, where some of the lands in dispute are situate, expressly shows that the widow has no power of disposition over the immovable property of her husband, and that his heirs take it on her death. (See p. p. 261 to 263.) The doctrine has been assumed as incontestable in the more recent cases, like that of the Collector of Masulipatam versus Cavaly Vencata Narainapah (8, Moore, 528.) The result of the authorities seems to be that, although according to the law of the Western schools the widow may have a power of disposing of movable property inherited from her husband, which she has not under the law of Bengal, she is, by the one law as the other, restricted from aliening any immovable property which she has so inherited; and that on her death the immovable property, and the movable if she has not otherwise disposed of it, pass to the next heirs of her husband. There is no trace of any distinction like that taken by the Pundit between ancestral and acquired property. In some of the cases cited the property was not ancestral.

Again, supposing that any of the property claimed in this suit were of the nature of *stridhun* and passed as such, the respondents would seem to have a better title to it than the appellant. The devolution of *stridhun* from a childless

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widow is regulated by the nature of the marriage, There is nothing here to show that Choteh Beebee was not married according to one of the four approved forms. In that case her *stridhun* would, according to the *Mitacshara* (chapter II, section XI, article 11), go to the respondents as the collateral heirs of her husband. This view of the law is confirmed by two cases in 2 Strange, pages 411 and 412, and the comments of Mr. Colebrooke and others thereon. Upon this record, however, it seems admitted that the whole of the property in dispute was either inherited from the husband Ramjee, or the fruit of its accumulations.

Their Lordships, then, are of opinion that Choteh Beebee had no power of disposition over the immovable property inherited from her husband, whether ancestral or acquired. Whether she had any such power over his movable property it is unnecessary to determine, since it has been found that no valid disposition of either kind of property has, in fact, been made. And this being the case, their Lordships are of opinion that, as between the parties to this record, the right to the possession of the whole of the property in dispute, on the death of Choteh Beebee, passed to and became vested in the respondents.

The decree impeached is, therefore, substantially right. Whether it is altogether right in point of form may be doubted. It contains (see page 98) an order that the respondents should recover from the appellant the possession of the immovable property, with *mesne profits* from the date of the institution of the suit; whereas the plaint seems to admit that the whole, or a large portion, of such property was at that date in the respondents' possession, and made no demand for *mesne profits*. The error (if error there be) appears only in the formal decree—not in the judgment upon which it is founded. The recommendation which their Lordships will humbly make to her Majesty is, that the decree of the Sudder Court be varied, and that it be thereby decreed that the respondents (the plaintiffs) be confirmed in the possession of so much of the immovable property in the plaint mentioned as was in their possession at the date of the institution of the suit; and be declared entitled to the movable property; and that they do recover from the defendant (the appellant) so much (if any) of the said immovable property as was in her possession at the date of the institution of the suit, with the *mesne profits* of such last-mentioned property from the said date, together with the costs of suit in both courts. Their Lordships, however, are of opinion, that notwithstanding the variation of the decree, the appellant must pay the costs of this appeal.

(Finl. Comr's. Selected Case II of 1868.)

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Thakoor Shere Bahadoor Singh, Plaintiff-Appellant, versus Raja Surubjeet Singh, Defendant-Respondent.

CLAIM to certain land said to belong to mouzas Bussuntpoor. Burgodia and Koodnápoor, area about 21,000 *kutcha beegas.*

Held that the "*dhar-dhoora*" custom can only be admitted on clear proof that it is the custom. Also, that where the land in dispute is recognizable as land settled with a talookdar in 1858, and included in his sanad, the custom, if it did prevail, is superseded by the title acquired in that year.

This case has been sent up on a preliminary point of law and is likewise in special appeal, the question being whether the talookdar's sanad bars a claim to land on the bank of a river, when such claim is based on an alleged "*dhar dhoora*" custom *i. e*, one by which the mid-stream is the boundary. Thakoor Shere Bahadoor claims an island of some 21,000 kutcha beegas on the strength of this custom.

2. The Settlement Officer held that as the defendant (Raja Surubjeet Singh) had held the land since 1257 Fuslee, and was summarily settled with in 1858 A. D. and holds a sanad, the claim of Shere Bahadoor was barred. The Commissioner also (quoting Financial Commissioner's decision in case of Neypal Singh versus Shere Bahadoor) held that "the land being assessed and the talookdar pay-"ing revenue on it, it must be held to form part of the es-"tate for which he had engaged prior to the 10th October "1859."

3. The special-appellant urges that this land was not assessed and summarily settled with special-respondent at re-occupation, and that there is no general rule that a talookdar's sanad exempts him from the necessity of following a clearly defined custom that the main-stream is the boundary between his own estate and that of another person: he argues too that the sanad only confers the "right, "title &c., of the *estate* of.....consisting of villages as per list attached" and that the 10th October letter declares that "every talookdar with whom a summary settlement "*has* been made since the re-occupation of the Province, "has thereby acquired "a permanent hereditary and trans-"ferable proprietary right *viz.* in the *talooka &c.*" The special appellant further argues that the 19th October letter also speaks of *talooka*, nowhere does it say that the actual limits of the estate are unchangeable, and it would seem, therefore, that there is no infringement of the sanad if the boundaries of the estate are defined by any law or customs which may be in force. The special respondent, on the other hand, advances that if a special custom did exist, which he does not admit, that custom was overborne by the grant in 1858.

4. In February 1865, the Financial Commissioner, when this same case came before him as a summary suit, ordered an investigation in regard to the custom in Oudh in respect to the boundaries of estates bordering on the river Gogra, and in his remarks on that enquiry he observes:— "A careful investigation has been made under the instruc-"tions of the Commissioners of Lucknow, Khyrabad and "Fyzabad. The result is that no uniform custom is estab-"lished except as regards the Fyzabad district, where (with

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"few exceptions) the main stream is recognized as the "boundary. From the districts of Baraitch and Durriabad, "which are higher up the river, the rule is relaxed and the "more usual custom is that where the land is of some extent "and capable of identification, possession and ownership are "not disturbed. The report from the Seetapore district "shows that whilst there is no fixed usage the *dhar-dhoora* "custom refers to land gradually cut away by the river, "but when, by a sudden change in the river's course, a "considerable portion of an estate is cut away, though "leaving the identity of the land clear, such portion would "remain in possession of the person from whose estate the "recession took place: in fact the custom is identical with "the law as laid down in clauses 1 and 2 section IV regu-"lation XI of 1825."

5. The following observations also occurred in the Financial Commissioner's judgment in the case of Neypal Sing, *versus* Shere Bahadoor:—

"If it be argued that as he *may* once have lost land "under the rule of the main-stream being the boundary; "he ought now to regain it under the same rule, the Finan-"cial Commissioner would reply that public policy requires "that that rude rule should only be admitted, if at all, "where it is perfectly proved to be the invariable custom, "which in this case it has not been." The Financial Commissioner is further inclined to hold that as the summary settlement of this land was made with the talookdar of Kumiar, the sanad might be pleaded in bar of the main-stream rule. Special appeal dismissed.

6. The custom, if it was one, of the main-stream forming the boundaries of estates in Oudh arose no doubt from the state of the times, for few villagers would venture across the broad stream with a chance of being opposed by the zemindars on the opposite bank, but we have changed now to a more civilized state of things, and under no circumstances so long as land is recognizable should it change owners. I have no hesitation then in ruling on the points referred by the Commissioner, and now in special appeal as follows:—

No clear proof having been adduced that the "*dhar dhoora*" custom did prevail on the banks of the river flowing between the estates of Thakoor Shere Bahadoor and Raja Surubjeet Singh, the claim of the former to hold this land under that custom cannot be admitted; moreover, the land in dispute being clearly recognizable as land settled with Raja Surubjeet Singh in 1858 A. D. and included in his sanad, the custom, if it did prevail, is superceded by the title acquired in that year.

L. BARROW,

27th April 1868. *Financial Commissioner, Oudh.*

(Finl. Commr.'s Selected Case No. III. of 1868.*)*

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Thumun Singh and Kesree, Appellants, versus Kindur and Oomrao Singh, Defendants.

MINUTE.

This case has been referred by the lower courts. It appears that the Aheers of Simurrea, pergunna Sandee, district Hurdui, claim *seer*. Their claim to the proprietary right has been dismissed by all the courts on the ground, that they "were *mokuddums*, they never rose to the full status of proprietors, they could not sell or mortgage." It is clear, then, that they cannot get "*seer*," as the word is used in Financial Commissioner's circular No. 1291 dated 16th 19th June 1865, ("The true *seer* of an exproprietor is that land "which was left to him at the time that he either conveyed "his *proprietary* right to another party, or was ousted from "the malguzari") or as it is used in Mr. Strachy's minute dated 7th January 1867 para: 5 ("Whenever a former pro- "prietor is in possession of land for which he pays rent at a "rate lower than that paid by ordinary cultivators of the "same class with himself such land is his *seer*"); but this is because the *seer* referred to is that of ex-proprietors only. Neither can the Aheers get a right of occupancy under section 4 of the Oudh Rent Bill, for they are not ex-proprietors. But the Settlement Officer's mistake is in supposing that, because the Aheers cannot get a right of occupancy under the Rent Bill *therefore*, they are barred from claiming a right of occupancy on other grounds. This is not laid down in the Rent Bill or any where else. It is true that the enquiry made in Oudh proved that their occurs, from prescription, no general right of this sort, but the courts are, of course, open to all persons who choose to claim this or any other right on any grounds whatsoever. It is for the court to decide whether the claim is made out. If Mr. Bradford's remarks be, in this case, correct, then it would appear that the Hurdui and Lukheempoor *mokuddums* enjoyed rights which are generally acknowledged, and it is for the court to enquire into, and decree such rights as exist, be they of a heritable and transferable nature like under-proprietary *seer*, or merely a right of occupancy at fixed, favorable, or market rates. The late Chief Commissioner (Sir C. Wingfield) never intended to limit the action of the ordinary courts in regard to individual claims. In paras: 40 and 41 of his letter to Government, No. 793, dated 1st March 1866, he writes:—"This, of course, would not bar the Settlement "courts from taking up a claim to rights of occupancy at "market or beneficial rates, if any such shall be preferred, "as every man bringing a claim to an interest of any kind "in land has a right to be heard in "the courts. The Chief Commis- "sioner contemplated the exercise "of this right in the accompanying "passage of the 54th para: of his "letter of July last."

"If he claims a cultivating right of occupancy, he can be referred to the settlement courts to establish it."

Where a suit for the proprietary right in a village had been dismissed on the ground that the plaintiffs were *mokuddums* who never rose to the full *status* of proprietors and could not sell or mortgage, *held* that although plaintiffs can neither get ex-proprietary *seer*, nor a right of occupancy under section 4 of the Oudh Rent Bill, they are not barred from claiming rights on other grounds; it is for the Court to enquire into and decree such rights as exist, be they of a heritable and transferable nature like under-proprietary *seer*, or merely a right of occupancy at fixed, favorable, or market rates. The enquiry made in Oudh proved that there occurs, from prescription, no general right of occupancy but the courts are, of course, open to all persons who choose to claim this, or any other, right on any grounds whatsoever.

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"The Revenue courts would also be open for the hear-
"ing of claims to interests in land sued for in virtue of for-
"mer proprietary right, but during the progress of a regular
"settlement, the Settlement courts have exclusive jurisdic-
"tion in suits for rights in land. Suits for rights acquired
"by clearing waste land, location of hamlets, or other im-
"provements effected by the occupants, would be claims
"founded on express or implied agreement, and could also
"be preferred at any time;" And, in claiming for zemindars the benefit of the enquiry into tenant rights, he remarked "that, except the class about to be favored, all non-proprie-
"tary cultivators shall he held to be tenants-at-will of the
"landlord, holding at his pleasure, unless they can indivi-
"dually establish rights of the nature specified in paras : 20
"and 22 of the Government letter No. 61 dated 16th Febru-
"ary last, by suits in court."

These paras : run as follows :—

"The Revenue courts would also be open for the hear-
"ing of claims by occupant cultivators to any stronger rights
"advanced on the ground of usage and custom, whether sued
"for in virtue of former proprietary right, of the clearing of
"waste land, location of hamlets, or other improvements
"effected by the occupant. These would be disposed of in
"conformity with the ruling custom of the neighbourhood;
"and whenever a *prima facie* case might be made out, it
"should, if possible, be adjusted by arbitration or *punchayut*,
"But the court of the Settlement Officer will continue to be
"held open to claims which cultivators may bring forward
"to any form of right, whether of mere occupancy, or of
"any further beneficial interest; and claims of this nature
"will be regularly disposed of under the judicial powers
"vested in the Settlement Officers for the purpose."

In his very last letter before leaving Oudh, Sir C. Wingfield further wrote :—

"Of course there is nothing to prevent a ryot institut-
"ing a regular suit on full stamp in the civil courts on the
"revenue side for any form of right which he may lay
"claim to, but it is not probable that any ryot will lay such
"a suit for a right of occupancy at market or beneficial
"rates, and the proprietors are not in the least afraid of the
"action of the Civil courts, Revenue side. The Settlement
"courts, whilst the revised settlement is in progress, are
"Civil courts for the adjudication of claims to rights of any
"kind in land, and the only courts in which such suits can
"be preferred ; therefore, I have admitted that any claim
"preferred by a ryot must be heard in them. Yet, although
"no stamp duty is charged in these courts, ryots have, I be-
"lieve, very rarely as yet filed plaints in them, because as
"the enquiry has shewn, they are conscious they possess no
"rights. Still, the only courts in which claims to any form
"of interest in land can legitimately be heard, are open to
"them now or at any future time, viz: the Settlement
"courts, or the Civil courts on their revenue side."

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Under these circumstances there can be no doubt that the claimants in the case in point, although they are not ex-proprietors, can prosecute their suit to a cultivating right of occupancy, and the Settlement Officer will try, and dispose of, the case on its merits.

6th May 1868. L. BARROW,
Financial Commissioner, Oudh.

(Finl. Commr's. Selected Case No. *IV of* 1868.)

Poorunmashee and others, Plaintiffs-Appellants. versus Baboo Hurdutt Singh, Defendant-Respondent.

CLAIM to sub-proprietary right in 84 *beegas of land, by virtue of Shunkullup Kooshust.*

The lower courts have dismissed the claim to this religious or charitable *shunkullup*. The Settlement Officer, on the grounds that plaintiff had lost possession since 1250Fuslee of all but 161 beegas, and because he did not consider the claim to the remainder cognizable, as it was a " resumable tenure."

2.—The Commissioner dismissed the suit as barred by limitation, and because a portion of it was claimed as King's *maâfee*, the enquiries regarding which had long since ceased.

3.—The investigation was made three years since, and is meagre. There is scarcely anything on record as to the nature of the grant of 161 beegas, now, and from a long time, it is asserted, in special appellant's possession. This, no doubt, arose from plaintiff's admission that the grant was a " charitable one," and such have, under existing rulings, been held *to* mean " a resumable grant at pleasure of the donor."

4.—I am of opinion that there should be further enquiry, because there are indications that such grants were not always dependent entirely on the will and favor of the donor. In this instance the great length of possession entitles the holder to a fair trial on the issue, " as to whether, what was given to him, perhaps as a *favor*, in the first instance, has not by custom and prescription become a right?" The courts cannot be too careful in considering this point, and as this claim has been brought forward, and involves the right of a talookdar to resume the *shunkullup*, the lower courts must now determine, " whether the tenure was created with the intention that it should be maintained only during the pleasure of the grantor, or during the performance of some specific service, (religious or secular) or as a permanent right, whether of property or occupancy," and judgment must be given accordingly. In the absence of any express written stipulation, or sufficient parole evidence, the nature of the implied contract should be determined in accordance with the custom prevailing in the part of the country in which the case occurs. No right in the tenure differing in kind from that which is proved to have hitherto existed will be decreed *e. g.*,

In a claim to *Shunkullup Kooshust* the issue should be tried whether what was given, perhaps as a favor in the first instance, has not, by custom and prescription become a right ; and whether the tenure was created with the intention that it should be maintained only during the pleasure of the grantor, or during the performance of some specific service, or as a permanent right whether of property or occupancy. In the absence of express written stipulation, or sufficient parole evidence, the nature of the implied contract should be determined in accordance with the custom of the neighborhood.

Act XVI. of 1865 does not apply to tenures originating in favor, claimants to which must prove possession in 1262-63 Fuslee.

The payments to be made by the *Shunkullupdar* must also, with certain reservations, be made in accordance with thestatus of 1262-63 Fuslee.

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if the tenure, although heritable, has not been transferable by sale, this condition will remain unaltered.

5.—In the investigation of this and of all cases of the same nature, it must be remembered that the extension of the term of limitation made by Act XVI. of 1865, is founded only on the agreement of the talookdars, and does not apply to tenures originating in favor. A claimant who cannot prove possession of his *shunkullup* holding in 1262-63 Fuslee, has no *locus standi* in court.

6.—As regards the payments to be made by the *shunkullupdar*, the court must also determine this in accordance with the status of 1262-63 Fuslee, always bearing in mind that the rent to be paid must not be less than the Government revenue, plus 10 per cent., nor less than the rent actually paid in 1262-63 Fuslee. If there is any deed, or it is shown by the custom of the country, that the rent should be more even than 20 per cent., above the Government demand, the terms of the deed will be acted on, or the rent will be fixed in accordance with the proved custom as the case may be.

7.—With these remarks, I remand the case for full investigation and disposal by the lower courts.

L. BARROW,

5th June 1868. *Financial Commissioner,*

(Finl. Commr's. Selected Case No. V. of 1868.)

Bhugwan Dutt and Ram Suroop, Plaintiffs-Appellants, versus Juggut Narain, Defendant-Respondent.

It is erroneous to dismiss a claim to rent-free land or *birt* on the ground that no valuable consideration was paid. To hold rent-free the claimant must prove by documentary evidence, that he is entitled to hold rent-free and that he so held in 1262-63 F; in this case rent-free possession will be upheld for his life, but his heirs will be liable to pay the Government revenue.

In the absence of documentary evidence the rent payable must be fixed according to custom, but never be less than the Government demand plus 10 per cent.

If a right be established to rent paying *birt* or *shunkullup* the actual rent paid in

In this case 41 beegas of land were claimed as *birt* at Rs. 1-8 per beega, and 24 beegas rent-free.

2.—The court of first instance decreed that the grant was merely by good will of the talookdar, notwithstanding that it was clearly proved that a certain consideration apparently quite beyond a *nuzrana* of a rupee or two had been paid for the land.

3.—The Settlement Commissioner ruled, in appeal, that no such valuable consideration had been paid as would entitle the holding to be considered of the nature of *birt*, but he gave no reasons for this finding. He also remarked that Mr. King had submitted the case for the opinion of several talookdars and canoongoes in regard to the custom of redeeming such grants, and it was shewn that where a consideration was paid the grant was not liable to redemption.

4.—Such being the case, it seems to me *prima facie* that a subordinate right may have been acquired of the nature referred to in para: 19 "Record of Rights." but even if it is proved that the consideration was only *nuzrana*, and insufficient to substantiate the *birt* claim, still the claimant must have a hearing on the issue referred to in Select Case No. V. (Poorunmashee, versus Hurdutt Singh.)

5.—In this instance a portion of the grant (24 beegas) is claimed rent-free, and a portion (41 beegas) at a rent

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of 1-8 per beega. Should the grantee's title to holdthe *shunkullup* be established on trial, the court will proceed to investigate the claim to the rent-free portion and the paying portion separately.

1262-63 F; should be fixed for the present settlement unless this is less than the Government demand plus 20 per cent. when the court will fix a new rent, not less than the Government demand.

In the former case the plaintiff must prove by documentary evidence that he is entitled to hold rent-free and that he so held in 1262-63 Fuslee; he will in this case be upheld for life, but his heirs will be liable to pay the Government revenue assessed on the land, or, in the absence of such proof, the rent payable to the talookdar must be fixed in accordance with the proved custom, and must never be less than the Government demand plus 10 per cent.

In the latter case the actual rent paid in 1262-63 Fuslee will be paid during the present settlement, unless the rent thus payable is less than the Government demand plus 20 per cent, when the court will fix a new rent according to its judgment, being not less than that paid in 1262-63.

6.—I remand the case for trial on the ground that it was erroneous to dismiss it altogether, because no valuable consideration had been paid.

L. BARROW,

5th June 1868. *Financial Commissioner, Oudh.*

(Finl. Commr.'s Selected Case No. VI of 1868.)

Gujadhur Sookhul, Plaintiff-Appellant, versus Seetla Bux, and Shunker Singh, Defendant-Respondents.

CLAIM to sub-proprietary right in mouza Bukulwa as birt.

1.—The following case exemplifies the manner in which *birt* grants were, at times, made in the Pertabgurh district.

It is no bar to a decree for sub-settlement which is based on the exercise of the absolute power of disposing of his property which was conferred on each talookdar by the summary settlement of 1858-59 that the claimant had not been in possession before annexation. A religious grant made for a consideration could not, in the *nawabi* be resumed, nor are they, in the Pertabgurh district, redeemable. The argument that the policy of our revenue system is adverse to the legalizing of perpetual leases should not hold good with regard to lands granted for a consideration, or for religious purposes. With reference to the safety of the Government

2.—The 2 puttas filed give a sub-lease to plaintiff of a small village on account of his performance of religious duties, for the family. The recipient was a *gooroo* of defendants.

3.—The transaction took place just after the rebellion, and the facts are clearly elucidated on account of its being of such recent date.

4.—The Assistant Settlement Officer decreed the *birt* which took the form of a sub-lease of the village at a low rate. The following is an abstract from his proceedings:—

"The plaintiff claims sub-settlement of Bukole or "Bukulwa from the defendants who are the talookdars. "He states his grandfather cleared the jungle and founded "the village and that he is, in consequence the zemindar; "but he makes no attempt to prove this allegation, and he "states that the real ground on which he bases his claim is "the grant of two puttas (*istumrari*) which were made out "by the defendants in his favor in 66 F. and 67 F. He "asserts that the puttas were given as religious gifts, but "in consideration of Rs. 948. The puttas are filed; they "both apparently refer to the whole of Bukole and in both

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demand, and the difference between former and present assets, the Court should not be bound by the letter of the terms specified regarding payments but should determine the terms on which these tenures are to be held, on equitable grounds.

" the perpetual rent is set forth as Rs. 101 per annum ; one " is given by defendant Seetla Bux, the other by defendant " Shunker Singh, and there is an interval of several months " between their respective dates.

" The defendants plead that the plaintiff is no zemindar. " They admit the genuineness of the two *istumrari* puttas, " but they urge that each putta was for the respective " share of the person who executed it, *i. e.* that the first " was for the 9-anna share in the village which belongs to " Seetla Bux, and that the 2nd was for the 7-anna share " of Shunker Singh. Seetla Bux, however, urges that " the putta granted by him must be held to have been " cancelled, because subsequently to the date of it the " plaintiff took a years' putta for Seetla Bux's 9-anna " share at Rs. 57 per annum for the years 1268 F. " to 1270 F. Shunker Singh states that his putta was ob- " tained by deceit from his (Shunker Singh's) son, that " it should have been given to Radha Kissen and Bud- " ree Narain who were his (Shunker Singh's) *gooroos*. " Further, both the defendants plead that there is now more " land included in Bukole than there was at the time these " *istumrari* puttas were given. To this plea the plaintiff " replies that both puttas relate to the whole village, and that " the second was only given in confirmation of the first, that " is to say, that the second was meant to show that Shunker " Singh acquiesced in the act of his brother Seetla Bux, " The putta for 58 F. to 60 F. at Rs. 57 per annum was " only given for the purpose of showing Seetla Bux's " separate interest in 9-16th of the rent. Radha Kissen " and Budree Narain were certainly the defendant Shunker " Singh's *gooroos*, but they are plaintiff's near relations, and " live in community with him, and he (plaintiff) gave the " money in consideration of which Shunker Singh acquiesced " in the grant of the perpetual lease. He also denies the " increase in the village area.

" The questions which arise are :—

" 1st.—Are these *istamrari* puttas now valid ?

" 2nd.—By them is plaintiff to pay Rs. 101 or Rs. 202 " per annum ?

" 3rd.—If plaintiff's right to hold under these puttas is " established, is he to hold the entire village as now demar- " cated, or do the puttas only convey a right to a portion of " the present mouza ? and if so, to what portion ?

" In the first place I find that these puttas, besides " being avowedly given for religious reasons, were granted " for a very considerable consideration : Seetla Bux's agent " has in this case admitted the receipt of Rs. 520 and " Shunker Singh has also admitted the receipt of ' the " money.' In Shunker Singh's evidence before Mr. " Wood, he specifies the money as Rs. 428 the exact sum " to which plaintiff now speaks—Shunker Singh, before " Mr. Wood, stated that the money was paid by Radha " Kissen and Budree Narain, and that the *goorduchna* putta

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" should have been made out in their name though in " terms identical with those of the putta given by the de- " fendant Seetla Bux to plaintiff: before me, Shunker " Singh's agent stated that the money should have been paid " by Radha Kissen and Budree Narain but that plaintiff " paid it and got the putta made out in his favor by " Shunker Singh's son. This discrepancy is of little conse- " quence for Radha Kissen and Budree Narain admitted in " this court that they had no claim apart from plaintiff's, " and that plaintiff is the manager of the family of which " they are all three members. It is clear that for Rs. 948 " paid by plaintiff the 2 *istumrari* puttas were written. " Decree for plaintiff, &c."

5.—In appeal the Commissioner reversed the Assistant Settlement Officer's order, and his main reasons are stated as follows:—

" 5.—The appellants were not competent to grant an " *istumrari* putta, the settlement with them being temporary; " moreover, the appellants argue the superior right had not " been decreed in their favor. Of this last plea the court " has a very low opinion. But it is entirely against the poli- " cy of our revenue system to legalize a perpetual lease. " Even in permanently settled Bengal the longest lease that " can be given is a 10 year's lease, while in temporarily " settled provinces the term of lease cannot extend beyond " the term of settlement. But these are not mere *istumrari* " puttas. They are in point of fact *shunkullupnamas*, and a " consideration has been paid by the grantees for the perpe- " tual leases, over and above the promise to pay the annual " rent. Can a *shunkullupdar* in such a case as the present be " admitted to a sub-settlement? Is he not disqualified by the " fact that the superior proprietor, the talookdar, may re- " deem the *shunkullup* grant at any time he may choose by " re-payment of the 'consideration' and that the option of " availing himself of this condition should be afforded to the " talookdar at settlement?

" Again (and the court here adverts to a plea which the " appellant has not brought forward, but, being one of law, the " court cannot pass it by) can any party claim a *pukka* lease " who was never in possession before annexation? The ques- " tion, it must be remembered, relates not merely to an un- " derproprietary right, but rather to a right to claim a sub- " settlement.

" 6.—The appellant's argument in his 5th plea is a " very fair one; when the putta was given the Government " demand from the talooka was Rs. 10,741; it is now Rs. " 16,000. The revenue demand in the village is now Rs. " 231, the rent only Rs. 101; the jumma when the putta " was granted was Rs. 158. The 'consideration' viz: Rs. " 928, covers the loss, it may be, of Rs. 57 per annum but " not that of Rs. 130.

" 7.—But, independent of the plea last mentioned, the " court is of opinion that in the present instance a sub-settle-

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" ment should not have been decreed, and that, for the " reasons given in para : 5.

" 8.—The *shunkullupdar* is protected by his *shunkullup-* " *nama* until redemption by the talookdar by re-payment of " the consideration ; that is, he cannot be made to pay more " then Rs. 101 rent, until the talookdar has repaid Rs. 928.

" The order of the lower court is reversed, and the " appeal is decreed."

6.—The main grounds for dismissing this claim were apparently then, that no person could set up a title to a *pukka* lease, who had not been in possession before annexation. It does not, however, appear to me, that this is any bar whatever to a decree for a sub-settlement which is based on an exercise of the absolute power of disposing of his property which was conferred on the talookdars under the summary settlement of 1858-59. They evidently considered they had a permanent title and created a *birt* tenure within their illaka in favor of their *gooroo,* that is, for the performance of certain religious services and for a very tolerable consideration, they gave the special appellants a sub-lease of a small village on favorable terms in perpetuity, as distinctly expressed in the puttas. It is unreasonable to suppose that special appellant would have paid down Rs. 948 and also agreed to pay an annual rent for a small village which was assessed at only 158 Rs. unless it was for a permanency, and, when we look to the religious nature of the grant, with what we know of the prevailing custom, it is self evident that in the *nawabi* such a grant could not have been resumed, and previous enquiry in Pertabgurh tends to show they were not redeemable.

7.—The Commissioner alludes to the policy of our revenue system being adverse to our legalizing *perpetual* leases, but I doubt if this argument should hold good against a well known and long established custom in Oudh of granting lands for a consideration, and for religious purposes.

8.—I do think, however, that public policy does demand, in considering these cases, that we should look to the safety of our own demand and to the former and present assets, and that some regard should also be paid to the very much better position the special appellant will enjoy under a decree of court then he did before. We are therefore not, I am of opinion, bound to adhere to the letter of the terms specified as regards payments but to define judicially the terms on which these *birts* are tenable on equitable grounds.

9 —Reversing then the orders of the lower court, and upholding those of the Assistant Settlement Officer, I decree sub-settlement to special appellant who will pay the Government demand plus 20 per cent. to the talookdar.

L. BARROW,

5th June 1868. *Financial Commissioner, Oudh.*

(Fin. Commr.'s Selected Case No. VII of 1868.*)*

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Balgobind and others, Plaintiffs-Appellants. versus Syreesal Singh, Defendant-Respondent.

This is a claim to B 17 bis. 6 bisn. 6 land as *shunkullup*. The grant appears to have been made a very long time ago to a favorite physician for his services.

2.—A curious feature in the case is, that the record shows, that when the talookdar attempted to resume the grant, the *maafeedar* appealed to the Nazim who actually upheld him for some time.

3.—The lower court thought some Rs. 51 had been paid for the *shunkullup*, but it was a very long time ago and there was nothing but parole evidence to the fact. Both courts therefore rejected the claim. The Settlement Commissioner did not believe in the payment of any consideration money at all. He remarked:—

"If this court agreed with the Assistant Settlement "Officer's finding on this point it would, in accordance "with its previous rulings in regard to *shunkullup* tenures, "be bound to decree in appellant's favor; for the court can- "not admit the force of the Assistant Settlement Officer's "remark that if the purchase of a right is held to be "equivalent to under-proprietary right, the right of resum- "ing *maafee* granted by a talookdar is lost to the talook- "dar. This court holds that all rights for which a valuable "consideration has been paid must be respected, and that "the payment or non-payment of rent to the talookdar can- "not effect the question as to whether the right was or "was not purchased. To render a rent-free tenure ex- "empt from the liability to be resumed by the talookdar, "it must be proved that the tenure was purchased, and "that it was a condition of the purchase, that the te- "nure should be held rent-free. Neither does the court "attach any weight to the Assistant Settlement Offi- "cer's opinion that any payment made in this case was "in the shape of *nuzrana*, and not a valuable consideration, "for the court has ruled that where the payment of money "is proved, such payment must be held to be a valuable "consideration whether it be called *nuzrana* or any other "euphonious name. But, taking all the circumstances into "consideration, the court holds that the payment of a "valuable consideration is not proved, and, in the absence of "proof cannot be inferred."

4.—I concur so far with the Settlement Commissioner that I do not think it is for us to determine what shall be deemed a valuable consideration." If money was paid at all, except, of course, a rupee or two as *nuzrana*, a return was expected, and when land was given at a low rate or rent-free after a payment, if redemption is barred, a subordinate right is actually gained.

5.—In the present case as it was proved that no consideration was paid, it only remains to try the issue, whether the grant was held by favor only or whether the

If land was given at a low rate or rent-free after a payment (except of course, of a rupee or two as "*nuzrana*") and redemption is barred, a subordinate right is actually gained. Where no consideration was paid the issue to be tried is whether the grant was held by favor only, or whether the claimant has a right of property in the land.

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physician has a right of property in the land (Vide issues case of Poorunmashee versus Hurdutt Singh.) Case remanded accordingly.

L. BARROW,

5th June 1867. *Financial Commissioner, Oudh.*

(Finl. Comr.'s Selected Case No. VIII. of 1868.)

Kundhye Doobay Plaintiff-Appellant, versus, Byreesal Singh and others, Defendants-Respondents.

The prevailing custom of the country being, apparently, adverse to resumptions of *shunkullup* land, the zemindar seeking to resume must first prove his right to do so.

If the right to the *shunkullup* is established, the rent actually paid by the *shunkullup*-holder in 1262-63 F. will stand during the settlement, unless it is less than the Government demand plus 20 per cent, in which case the court should fix a new rate varying from 10 to 20 per cent above the Government demand.

In this case the claim is for 61 beegas of *shunkullup* land. It was averred by plaintiff that 200 rupees and 3 gold mohurs were paid as consideration money, but, on trial, this was not proved in any of the courts.

2.—A deed was produced, which makes no allusion whatever to payments or to consideration money, but says the grant was for "love of God" (*bishenpreet*). By the deed the grant is for 50 beegas: the Settlement Officer, however, decreed 71 beegas, 17 biswas, 10 biswansees, as the land in plaintiff's possession came to that amount by measurement.

The Commissioner reversed this order, on the grounds that the *shunkullup* was only talookdar's *maâfee*

3.—This grant lies in that portion of the Soojakhur illaka which was confiscated and conferred on a loyal grantee. There is little doubt but that this is a religious grant, and, as the talookdars themselves admit that they never resume such, and the prevailing custom of the country is apparently adverse to such resumptions, the present zemindar (the loyal grantee, must prove that this is a "resumable grant" before he can touch it, and I remand this case for trial, with reference to my remarks in Select Case No. V., Poorunmashee, &c., *versus* Baboo Hurdutt Singh.

4.—It is shown in the proceedings that the former payment for this *shunkullup* land was Rs. 1-8 per beegah, and if this was the rent actually paid in 1262-63 Fuslee by the *shunkullup-holder*, it will stand during the present settlement; provided that if the rent thus payable is less than the Government demand plus 20 per cent., the court should fix a new rate of, say, not less than 10 or even 20 per cent., and provided, of course, the first issue now sent for trial is proved.

L. BARROW,

5th June 1868. *Financial Commissioner, Oudh.*

(Finl. Comr.'s Selected Case No. IX of 1868.)

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